FILE COPY

No. [illegible]

IN THE

Supreme Court of the United States

MEMPHIS TRANSIT CO., Petitioner

vs.

STATE OF TENNESSEE, ex rel
W. M. LEECH, Commissioner

(Tennessee Supreme Court Record captioned State of Tennessee, ex rel vs. Southern Bell Tel. & Tel. Co. et al with Memphis Transit Co. an Intervenor.)

PETITION FOR WRIT OF CERTIORARI ON BEHALF OF MEMPHIS TRANSIT CO.

(Formerly Memphis Street Ry. Co.)

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PETITION FOR WRIT OF CERTIORARI ON BEHALF OF MEMPHIS TRANSIT COMPANY (Formerly Memphis Street Railway Company)

By Petition for Certiorari, Memphis Transit Company seeks a review of a decision of the Supreme Court of Tennessee holding invalid Chapter 170 of the 1957 Public Acts of Tennessee, which Act, (Appendix 9), among other things, would have enabled the State of Tennessee to pay ten per cent of the cost of relocating public utility facilities necessary to qualify for the Federal ninety per cent under Section 111 of the Federal Highway Act of 1956 (23 U.S.C.A. 123). Upon the estimated cost appearing in the record more than $828,000 is involved for this petitioner and in addition a principle in which literally hundreds of millions of dollars are involved as well as all of the utility users and riders in the Nation and the gross inequity of having citizens in some States pay for the cost of removing utility facilities in Public Utility rates

and again paying Federal taxes to pay ninety per cent of these costs in other States, whereas in States where the Enabling Acts enabling the States to qualify are upheld, these costs will not be collected again in utility rates. The tremendous costs involved are brought about by a vast new concept of multi-lane high speed traffic ways, which require rights-of-way of spectacular width, clover leafs, overpasses, underpasses and long distances thereof through urban areas contributing to the tremendous cost of the National System of Interstate and Defense Highways. Because of the tremendous economic impact involved in this new concept of Interstate Highways petitioner believes this matter to be of sufficient importance to merit consideration and a decision by this Honorable Court.

JURISDICTION—FEDERAL QUESTION "SUBSTANTIAL IN CHARACTER"

This case was originally brought by the Commissioner of Highways and Public Works of the State of Tennessee, in the Chancery Court of Davidson County, Tennessee, as a declaratory judgment suit to contest the constitutionality of Chapter 170 of the Tennessee Public Acts of 1957. This Court located at Nashville, Tennessee, is a court of original unlimited jurisdiction in Tennessee for such matters. That court upheld the validity of Chapter 170 of the Public Acts of 1957 and a copy of the Chancellor's unreported opinion is appended hereto as Appendix 1, and the case was then appealed direct to the Tennessee Supreme Court, who on the original hearing held Chapter 170 of the Public Acts of 1957 unconstitutional by a split decision of 3 to 1, with Chief Justice Neil not participating. A copy of the majority opinion is

appended hereto as Appendix 2, and a copy of the minority opinion is hereto appended as Appendix 3. Subsequently a petition to rehear was granted, the case was reargued and decided by a split opinion of 3 to 2, with Chief Justice Neil and Justice Tomlinson dissenting. A copy of the majority opinion authored by Justice Alan Prewitt and the concurring majority opinion of Justice Swepston are hereto appended as Appendix 4 and 5 respectively, and the dissenting opinions of Chief Justice Neil and Justice Tomlinson are appended as Appendix 6 and 7 respectively. All opinions on both hearings in the Tennessee Supreme Court are reported at 319 SW 2nd, Page 90, except the first dissenting opinion of Justice Tomlinson, which was omitted.

Section 1257, Subsection 3, of Title 28, USCA, provides:

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:

• • •

(3) By writ of certiorari where the validity of a treaty or statute of the United States is drawn in question, or where the validity of a state statute is drawn in question on the ground of it being repugnant to the Constitution, treaties or laws of the United States, *or where any title, right, privilege or immunity is specially set up or claimed, under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.*" (Emphasis supplied.)

Subsequent to all of the opinions referred to above, this petitioner filed a motion necessary under Tennessee Supreme Court, Rule 32, for permission to file a *second* pe-

tition to rehear, which motion was granted (R 118), but the petition subsequently denied January 23, 1959. (Order at Appendix 8 R. 121). Pursuant to Rule 41 of the Tennessee Supreme Court, petitioner filed a praecipe designating the record, which has been prepared and which is being filed along with this petition. A copy of this petition for certiorari was mailed to opposing counsel in accordance with the rules of this Court April 21, 1957.

Petitioner respectfully contends that the further background for jurisdiction of this Court under Title 28, Section 1257 (3) is as follows: The suit as originally filed by the State of Tennessee for declaratory judgment made the Southern Bell Telephone and Telegraph Company a defendant. The petitioner, along with many other publicly and privately owned utilities intervened in the cause and then filed demurrers to the State's original bill. Petitioner in its intervening petition filed in the lower court, after alleging jurisdictional grounds, alleged in substance in the intervening petition, found at pages 44 through 46 inclusive of the record prepared by the Tennessee Supreme Court Clerk, that it was operating a local passenger transportation system in the City of Memphis under franchise granted by the Board of Commissioners of the City of Memphis by ordinance passed September 4, 1955, as amended, which franchise covered a twenty year period beginning November 21, 1945, and ending November 20, 1965; that the company owned and operated 164 electric trolley coaches, which get their power from overhead trolley lines, similar to the type used on old fashioned streetcars, and also operates 141 gasoline and/or diesel buses over 248 miles of route, wholly within the City of Memphis, and carry approxi-

mately 35,000,000 passengers per year, and all of said coaches and buses are operated upon the streets of Memphis, or upon private rights of way. That the presently planned segments of the proposed Interstate Highway System in and around Memphis crosses thirty of the company's thirty-three lines at thirty-one separate points, twelve of which would involve long-existing electric trolley coach overhead facilities, and thirty of these would be forced to be relocated or reconstructed and other points would be effected by the Federal Aid primary and secondary systems of highways as defined under the Federal Aid Highway Act of 1956. The sworn intervening petition further alleges that it is impossible to accurately estimate the cost involved to this company if it were financially able to relocate these facilities; that the amount was believed to be in excess of $800,000.00, which cost the capital structure of the company would not stand. The sworn intervening petition further alleged in substance that the probable result if the company were ordered to relocate would be the abandonment of certain facilities essential to many of the citizens of Memphis, and Tennessee; further, that the Memphis Street Railway Company because of the tremendous cost involved would probably be forced into bankruptcy or receivership, if forced to relocate its facilities at its own expense; and alleged that the rates or fares are regulated by the Board of Commissioners of the City of Memphis sitting in lieu of the Public Service Commission under the provisions of Section 65-1601 of Tennessee Code Annotated; that the experience of the company has proved a consistent loss of passengers since World War II, which loss continues with the continued sale of automobiles, and which loss is expedited by increased fares; and that for the foregoing reasons the petitioner's very existence may

be at stake in the litigation. The intervening petition further asks authority to intervene and plead, answer or demur, joined in a request for a declaration as to the constitutionality of Chapter 170 of the Public Acts of 1957 (Appendix 9), praying that said Chapter be declared constitutional and valid. Again, in this petitioner's first petition to rehear in the Supreme Court of Tennessee, which sworn petition is found at pages 53 through 58 inclusive of the record prepared by the Tennessee Supreme Court Clerk, it was alleged in substance that this petitioner's very existence depended upon relief in this matter, if presently planned expressways (Interstate Highways) are built in Memphis; and that if the estimated cost of relocation of $828,000.00 were forced upon the company, it would completely wipe out the stockholders' equity, with the inevitable result of a bankruptcy or a receivership; and that the company did not have and could not produce the amounts of money required for relocation cost under present expressway plans, which would mean that affected overhead trolley lines would have to be abandoned to the detriment of the public, as well as the company, and that this petitioner conveyed certain real property, expended over $600,000.00 for paving, agreed to make a $75,000.00 contribution to the cost of constructing certain bridges and paid other very substantial considerations for its franchise, as part of the franchise agreement, in which it had a vested property right. A copy of Chapter 170 of the Tennessee Public Acts of 1957 found in the 1957 Public Acts at page 554 is appended hereto as Appendix 9, and a copy of Section 111 of the 1956 Federal Highway Act is likewise appended as Appendix No. 10, (U.S.C.A. Title 23, Section 123), which showed that under the Federal Act involved, the company could not benefit from any increase in value of a new or re-

moved facility or any salvage derived from the old facility, but that these are what we term "non-betterment" costs of relocating the utility's facilities. The first sworn petition to rehear further sets forth that this petitioner would receive no earthly benefit which was not common to the entire tax paying public and the sworn petition further alleged that "forcing the estimated cost of relocating facilities under current expressway plans on this petitioner will amount to *confiscation* of its property, contrary to the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8 and 21, of the Tennessee Constitution." This petition further alleged that the Tennessee Supreme Court had overlooked the fact that Chapter 170 was a police measure, and as such the determination of the equity or reasons underlying its enactment was a legislative matter, rather than one for judicial decision. The first sworn petition to rehear further states that the Tennessee Supreme Court had interpreted the Tennessee Constitution as requiring an economic result, which was almost incredible. The petition further pointed out that the State had alleged that $15,000,000.00 was involved for the Southern Telephone Company alone in Tennessee (probably an understatement), and this meant that if the Tennessee Act enabling payment of the 10% to qualify under the 1956 Federal Highway Act for 90% reimbursement on the Interstate System was not allowed to stand, that Tennessee tax payers would pay that cost in increased utility rates, and again be paying federal taxes to pay 90% of the relocation costs in states which had permitted similar acts to stand, thereby forcing a severe economic penalty on the citizens of Tennessee.

Again, in the second sworn petition to rehear, found at

pages 105 through 117 of the record prepared by the Tennessee Supreme Court Clerk, petitioner alleged at page 108:

> "This petitioner respectfully states and believes that the Court has not considered its sworn allegation, which has not been denied or questioned by the State, to the effect that forcing the estimated cost of relocating its utility facilities under the present expressway plans on this petitioner will amount to confiscation of its property, contrary to the Fifth and Fourteenth Amendments of the United States Constitution, and Article I, Sections 8 and 21 of the Tennessee Constitution."

The State constitutional provision prohibiting the lending of the State's credit is Article II, Section 31 (Appendix 11), and this petitioner again in the second sworn petition to rehear alleged:

> "In the case of this petitioner the effect of the majority opinion would amount to confiscation of its property, contrary to the Fifth and Fourteenth Amendments of the United States Constitution, and Article I, Sections 8 and 21 of the Tennessee Constitution, and in addition thereto would have the effect of holding Article II, Section 31, of the Tennessee Constitution in violation of Sections 8 and 21 of Article I of the Tennessee Constitution, and contrary to the Fifth and Fourteenth Amendments of the United States Constitution." (See Article 1, Sections 8 and 21 of the Tennessee Constitution at Appendix 12.)

As stated, the case went from the lower court to the Tennessee Supreme Court on demurrer and all of the sworn allegations in the intervening petition filed in the

lower court and the first and second petitions to rehear in the Tennessee Supreme Court go unchallenged by the State of Tennessee in this cause.

The Tennessee Supreme Court even declined to remand the case to the Chancellor for proof to more fully develop the facts relied upon by this petitioner. This petitioner verily believes that ample precedent for the granting of this writ is found in the case of:

> Nashville, Chattanooga and St. Louis Railway, Appellant vs. Herbert S. Walters, Commissioner of Highways, et al 294 U.S. 405, 79 Law Ed. 949.

This case was argued December 6, 1934, restored to the docket for reargument December 17, 1934, reargued January 16, 1935, and decided March 4, 1935. Like the present case, the Walters case originated as a suit for a declaratory judgment in the lower court, and in the lower court the railroad had contended that a state statute imposing upon railroad companies, in every case in which the state highway commission shall in its discretion order the elimination of grade crossings, pay one-half of the total cost of the separation of the grades. The particular underpass in question was to be built in the small town of Lexington, Tennessee, and the court, even in 1935, refers to it as being part of a national system of super highways provided for by act of Congress. The federal government was to pay one-half of the cost of building the highway, including the underpass. The State passed the State's one-half share in the cost of the underpass along to the railroad under a state statute. The Chancellor ruled in favor of the railroad. The Tennessee Supreme Court reversed the case wholly without consideration of the facts relied upon as showing that the order and

statute as applied were arbitrary and unreasonable, on the ground that the statute was constitutional on its face as a valid exercise of the police powers. This Honorable Court reversed and remanded the case to the Supreme Court of Tennessee for consideration of the railroad's evidence that the order and application of the statute were arbitrary and unreasonable. This case is very analogous to the instant case, one of the main points being that *without the federal highway program of that day the construction of the underpass would not have been necessary. Similarly, the* 1956 *Federal Highway Act is the real causitive factor in the relocation of the overhead wires of this petitioner. In the Walters case the petitioner was relying upon the Fourteenth Amendment of the United States Constitution, as this petitioner is relying upon the Fifth and Fourteenth Amendments.* In the Walters case, this Court at page 413, 79 Law Ed., commented upon the fact that the main contention in the Walters case was *"that to impose upon the railroad under existing circumstances one-half of the cost is action so arbitrary and unreasonable as to deprive it of its property without due process of law, in violation of the Fourteenth Amendment."* This was outlined as one of the principal contentions in the Walters case, and *in the instant case the petitioner, under the decision of the Tennessee Supreme Court, would have to pay ALL of these relocation costs and this presents a stronger case than just half of the cost imposed upon the railroad in* 1935. (Emphasis ours.)

This Court, at page 955, 79 Law Ed., held in the Walters case:

"A statute valid as to one set of facts may be

invalid as to another. (Footnote reference 5.) A statute valid when enacted may become invalid by change in the conditions to which it is applied. (Footnote 6.) The police power is subject to the constitutional limitation that it may not be exerted arbitrarily and unreasonably. (Footnote 7)."

The footnotes contain numerous authorities cited on these propositions.

In the Walters case, the Court was dealing with a federal highway act of far-reaching effect for that day. The 1935 cost, however, of removing and relocating transit companies' overhead trolley wires, facilities of private and public power companies, water companies, railroads, sewer lines; telephone and telegraph wires, and other utility facilities were a mere drop in the bucket compared to the hundreds of millions of dollars involved throughout the nation in relocating facilities that will become involved in the vast new concept of freeways, expressways and Interstate Defense Highways, contemplated by the enactment of the 1956 Federal Highway Program. The Tennessee Legislature recognizing this vast new concept of roads and highways decided to pass legislation enabling the state to contribute the 10% necessary to qualify for the federal 90% on Interstate Defense Highways for benefit of the utility riders and users. There are 99 members of the House of Representatives and 33 members of the Senate, in Tennessee. These members were so positive that they were exercising legislative discretion reasonably that they passed Chapter 170 of the Public Acts of 1957 in both houses *without a dissenting vote*, yet the Tennessee Supreme Court would substitute its 3 to 2 split decision, with the Chief Justice dissenting, for the unanimous vote of the legislature on a question of who

shall bear the cost of removing these facilities, in the face of an overwhelming weight of authorities that hold that it is a matter for legislative discretion.

Oswego Etc. Ry. Co. v. State
124 N. E. 8 (New York)
LeHigh Valley Railroad Co. vs. Canal Board
97 N. E. 964
City of Chicago v. Chicago Railroad Co.
122 N. E. (2d) 553 (Ill.)
Cavender v. Hewett
145 Tenn. 471, 239 S. W. 767

and other cases cited in these cases and hereafter in this Petition.

While it was not true in all cases, it was the general common law rule that the State could require a Public Utility to move its utility facilities to meet changing conditions, but the rule evolved out of the horse and buggy days, when changes were minor, mostly local in nature and cost of changes were insignificant compared with the presently planned vast systems of Interstate Defense highways. This petitioner believes that this Court will be progressive enough to recognize these vast changes. Congress in passing the 1956 Federal Highway Act recognized the need for the change in the rule and made provision for states, which would contribute ten per cent on Interstate Defense Highways and under certain other conditions. The Tennessee Legislature recognized the need for the change by passing Chapter 170 of the Public Acts of 1957 unanimously. The majority opinion of the Tennessee Supreme Court in this three to two split decision presumes to substitute judicial discretion for legislative discretion in violation of the principles set down in the cases cited herein.

DESPITE CONFLICT BETWEEN STATE COURTS THE OVERWHELMING MAJORITY UPHOLD ACTS SIMILAR TO CHAPTER 170 OF THE PUBLIC ACTS OF 1957 OF TENNESSEE BASED ON THE 1956 FEDERAL HIGHWAY ACT AND WITH STATE CONSTITUTIONAL PROHIBITIONS AGAINST LENDING OF STATE'S CREDIT.

In Maine the question first arose in the case of

Opinion of the Justices

132 Atlantic (2nd) 440.

Article 9, Section 14 of the Maine Constitution provided:

"The credit of the State shall not be directly nor indirectly loaned in any case . . ."

The Maine Court held that the Act did not violate that Section of the Constitution, stating at page 443:

". . . at common law there is no obligation to pay for the removal or relocation of public utility facilities required by changes in highways. (Citing cases). The state, however, may, in our view, pay for the cost of relocating such facilities, if it chooses to do so. *The purpose of such expenditures is public in nature and the extent and condition under which the state may meet such cost are for the Legislature to determine.*" (Emphasis added)

In New Hampshire the question was raised in

Opinion of the Justices

132 Atl. (2nd) 613.

In that case the Court said:

"While the obligation to remove or relocate utility facilities is placed on the owner by common law, the Legislature may change this rule. (Citing cases)." This principle was expressed in *recent Opinion of the Justices, Me.*, 132 *Atl.* (2d) 440 (decided May 6, 1957), as follows: " 'The state, however, may in our view pay for the cost of relocating such facilities, if it chooses to do so. The purpose of such expenditures is public in nature, and the extent and conditions under which the state may meet such costs are for the Legislature to determine.' " The common law rule which places the cost of relocating facilities on the owner, "'specifically admits of Legislative change.'" Relocation of public utility facilities due to highway improvement—an analysis of legal aspects, *Highway Research Board, Special Report*, 21, *page*, 40 (1955). If the Legislature decides to make such a change, it would not be a violation of our Constitution, *Part* II, *Article* 5, *or Part* I, Article 10. *Springfield v. Springfield Street Railway Co.* 182 Mass. 41; *West Chester Elec. R. v. West Chester County Park Com.* 225 N. Y. 297. See Opinion of the Justices, 88 N. H. 484, 490."

". . . The relocation of utility facilities is an integral part of highway improvements. The Legislature, if it chooses to do so, may validly declare that the relocation of utility facilities is part of the cost of highway relocation, and reconstruction and shall be paid out of highway funds."

Opinion of the Justices

132 Atl. (2d) 613, 615, 616 (N. H.)

In Minnesota the question was raised in Minneapolis Gas Company v. Zimmerman, Commissioner, a unani-

mous decision of the Supreme Court of Minnesota handed down July 11, 1958 and a copy of this decision is appended as Appendix 13. Minnesota had a similar constitutional provision prohibiting the State lending its credit to the provision in the Tennessee Constitution, and they upheld an Act similar to Chapter 170 of Tennessee Public Acts of 1957.

In Texas the question arose in the consolidated cases of State of Texas v. City of Dallas and State of Texas v. City of Austin and has been passed on in both a Lower Court and the Texas Court of Civil Appeals. A copy of the opinion of the Texas Court of Civil Appeal filed December 17, 1958 is attached hereto as Appendix 14. Texas had a State Constitutional provision prohibiting the lending of the State's credit, as did Tennessee, and had passed an Enabling Act similar to Chapter 170 of the Public Acts of 1957. The Texas Court of Civil Appeals affirmed the Lower Court upholding the Act in the opinion referred to above.

In Idaho the question arose in a case that has been decided in the District Court of the Third Judicial District of the State of Idaho in State of Idaho v. Idaho Power Company. In Idaho, as in Maine, New Hampshire, Minnesota, and Texas referred to above, they had a State Constitutional prohibition against the lending of the State's credit, and had passed *Enabling Legislation based on the* 1956 *Federal Highway Act* similar to Tennessee Public Act 170 of 1957. Again in Idaho the constitutionality of the State Act was upheld. A copy of the Idaho opinion is appended as Appendix 15.

In the State of North Dakota, there was a similar constitutional prohibition against the state lending its credit

in aid of a private corporation, and the state had passed an enabling act similar to Chapter 170 of the Tennessee Public Acts of 1957. In the case of Northwestern Bell Telephone Company vs. Wentz, Highway Commissioner the District Court of North Dakota upheld an act similar to Public Chapter 170 of the Tennessee Acts of 1959 in an opinion which is attached hereto as Appendix 16.

In Montana which likewise has a state constitutional provision prohibiting the state lending its credit in aid of a private undertaking, the District Court likewise upheld an act similar to Tennessee Public Act 170 of 1957 in a very well reasoned opinion which is appended as Appendix 17.

In addition to the seven States referred to above, wherein opinions are cited, or are attached in the Appendix to this petition, we are advised that the question has been raised for an opinion of the State Attorney General in the States of Florida, Georgia and Nebraska, and that in all three of these States they have ruled in favor of the constitutionality of Acts similar to Tenn. Chap. 170 of 1957. *This question will undoubtedly arise in future cases* as seventeen States have passed Enabling Acts similar to Tennessee Public Act 170 of 1957 and more will undoubtedly follow.

In Pennsylvania the case did not arise out of a State Statute similar to Tenn. Chap. 170 but out of an order of the Pennsylvania Public Utility Commission in

Department of Highways v. Pennsylvania Public Utility Com.

136 Atl. (2nd) 473, 477 (1957).

In that case the Court said:

"The cost of relocating the utilities enters into the rate structure of the Public Utility Companies, and is paid by the Company's rate payers. It is error to intimate or suggest that such cost is borne by the officials or even the stockholders of the Company. The question of whether the cost of the required relocation of telephone poles erected upon the rights-of-way, with authority of the Commonwealth, should be paid on the telephone bills or at the gasoline pumps has been a matter of governmental concern for years . . ."

In the same case the Court further said:

". . . If State 'A' receives from the Federal Government ninety per cent of the cost of utility relocations on interstate highways because the policy of that State is to bear this cost, while State 'B' receives nothing from the Federal Government for utility relocations because its policy is not to bear this cost, the citizens of State 'B' will pay on their utility bills for utility relocations in their State, and will also pay in their Federal gasoline tax for part of the cost of relocating utilities in State 'A'.

"This situation encouraged the introduction of bills in various State Legislatures to require the State (and thus the Federal Government) to pay for the relocation of utilities located with the Highway rights-of-way * * *."

The reasoning back of the Congressional intent is found at page 53 of the Report from the Committee on Public Works on the Federal Aid Highway Act of 1958,

Senate Report No. 1407, 85th Congress, Second Session.

These views were adopted by the Senate and are reflected in the Act. The Senators said:

"It is submitted that there was a valid reason for the State to amend their laws. The conditions under which utilities agreed to bear the burden of relocation cost disappeared, or at the very least, were radically and substantially changed, with the enactment of Federal Highway Act of 1956.

In the old days, such relocation costs were encountered on a gradual and small scale. They embraced relatively minor operations in type. Their sum total was within the reach of the utility's ability to pay for same, whether the utility was publicly, privately or cooperatively owned.

Under the Act of 1956 all of this was heavily changed. A crash program of unprecedented scale was inaugurated. Federal funds available for Highway construction rocketed from $875,000 to $2 billion within a single year. Greater increases are scheduled for following years. In addition, the type of construction changed. The modern multilane, high speed traffic ways require rights-of-ways of spectacular width; clover leaves, overpasses, and under passes, and long distances thereof through urban areas, bringing expressways to the heart of metropolitan centers.

These changes brought about inordinate expenditures for moving vast amounts of facilities at a great cost to the users of the utilities. They bring about a tremendously different treatment than when highway improvement was a local convenience and a local cost, relatively speaking."

From the Congressional Reports it is obvious that Congress recognized that many of the users of these Interstate Defense Highways would be citizens from without the State, and that it was not equitable to force local ratepayers to pay all of the cost of moving the facilities as they did in the horse and buggy days, when travel was largely local.

As opposed to all of the foregoing authorities, New Mexico and Tennessee stand alone with the minority rule with two of the five Tennessee Justices, including the Chief Justice strongly dissenting. The original Tennessee Supreme Court decision was written first, and the New Mexico Court relied heavily upon it, and quoted from it at length. Before the opinion of the Tennessee Supreme Court on rehearing, the New Mexico case had been decided, and Judge Alan Prewitt cited the New Mexico case and relied upon it. It is respectfully urged that both the New Mexico opinion and the Tennessee Majority Opinion lacked sound reasoning and *would have the effect of construing their State Constitutional Provisions prohibiting the lending of credit in a manner so that they would take property rights without due process of law, in violation of Article* 5 *and* 14 *of the United States Constitution.*

It is further respectfully urged that the New Mexico Court and three Justices of the Tennessee Supreme Court stand against an overwhelming weight of authority to the contrary, with each citing the other and each trying to hold the other up.

Before the passage of the 1956 Federal Highway Act and the cases cited above, growing out of Enabling Legis-

lation similar to Tennessee's Public Act 170 of 1957, it was well settled that the Legislature could change the common law rule and the policy of the State, regarding the exercise of its police power.

The Pennsylvania Public Service Commission case, supra, cites with approval

Delaware Port Authority v. Public Service Commission

119 Atl. (2nd) 855 (Pa.).

Upholding the same general principle are

Oswego, et cet., Railway Company v. State
124 N. E. 8 (N.Y.).
LeHigh Valley R. R. Co. v. Canal Board
97 N. E. 964.
City Beaumont v. Priddie
65 S. W. (2nd) 434 (Texas),

and others, which would only be a burden to the Court.

Justice Cardozo, in writing the opinion in the Oswego case referred to the LeHigh Valley Railroad case and said:

"• • •, We did not deny the power of the Legislature in the improvement of navigation to tear down bridges and other obstructions, without requittal for resulting loss. (Citing cases). *We held, however, that the Legislature did not violate the Constitution in refusing to exert the full measure of its might. Mere gifts and benevolences in aid of private undertakings, the Constitution does prohibit. (Citing cases). It does not prohibit the recognition of claims which have their roots in equity and justice.* (Citing

cases). This is not a case where the Legislature, after building a canal, has voted compensation retrospectively for the expense of a private undertaking. We say that to exclude problem, and not to suggest its answer. *This is a case where the Legislature, by action looking to the future, has defined the terms of equity and justice upon which it will go into an enterprise.* In fixing these conditions the Legislature has a wide discretion. LeHigh Valley Railroad Company v. Canal Board, 204 N. Y. at page 476, 97 N. E. 964, Ann. Cas. 1913 C, 1228. *Courts will not revise its judgment unless there has been manifest abuse.*

"* * *, The State was about to execute a great Public Work. It saw that in the doing of that work there would be destruction of private property. Much of the damage would be damnum adsque injuria. Nonetheless it would be damage. *The result would be inequality in the distribution of public burdens. Some would pay more dearly than others in proportion to benefits received. This inequality the Legislature, fixing in advance for conditions of the undertaking, had the power to correct. It might refuse to launch an enterprise at the price of hardship and oppression. There was power to destroy, and leave the loss where it might fall. There was also power to pay for the destruction, and thereby reestablish some uniformity of proportion between benefits and burdens. The question was for the Legislature whether the equity of compensation was strong enough to merit recognition. We cannot hold it to be illusory.*" (Emphasis added.)

It should be noted here that the "Interstate System" with its very wide rights-of-way, and clover leafs is of primary concern to this petitioner, and where it will run into most of its major costs. The Interstate System dealt with in Section 1 of Chapter 170 differs in character and

importance from the primary and secondary systems referred to in Section 2. House Report No. 2022, 84th Congress, Second Session on Federal Highway Act of 1956 says on page 8 with respect to Interstate System:

> "* * *, This system which is limited to 40,000 miles in total extent, comprises routes of greatest importance to the economy and welfare of the Nation, and to the National Defense. It is the backbone of the Nation's Highways.
>
> This system as now fully designated connects 42 State Capitols and ninety per cent of all cities over 50,000 population. Though it constitutes only 1.2 per cent of the total U. S. road mileage, when completed as provided for in the bill herein reported it may be expected to carry 20% of the Nation's total traffic load. Untold streams of Interstate Commerce move over it in times of peace. It is a military essential for movements of men and materials in time of war. The Department of Defense, which cooperated in the designation of this System, has repeatedly stated that it contains the strategic routes of greatest importance to the defense needs of the United States. In the testimony before this Committee, that Department urged that a program to accomplish fully the necessary improvements for this System be undertaken immediately.
>
> The Committee feels that the National Defense significance of this System is so important that its name should be changed to 'National System of Interstate and Defense Highways,' and the bill so provides. The name is abbreviated in the bill to the 'Interstate System.'"

Recognizing the great importance of the Interstate System and the urgency of its completion the Congress

provided in Section 108(a) of the Federal Act of 1956 as follows:

> "• • •, It is hereby declared to be essential to the National interest to provide for an early completion of the 'National System of Interstate Highways,' as authorized and designated in accordance with Section 7 of the Federal Highway Act of 1944 (58 Stat. 838). It is the intent of the Congress that the Interstate System be completed as nearly as practicable over a thirteen year period and that the entire system in a States be brought to simultaneous completion. Because of its primary importance to the National Defense, the name of such System is hereby changed to the 'National System of Interstate and Defense Highways.' Such National System of Interstate and Defense Highways is hereinafter in this Act referred to as 'Interstate System' ".

The primary system embraces less important Interstate Highways and the secondary system relates to "principal secondary and feeder roads, including farm to market roads, rural free delivery mail and public school bus routes." (Federal Aid Highway Act 1944, Section 3(b)).

Article 2, Section 31 of the Tennessee Constitution provides:

> "Acts Forbidden the State.—The credit of this State shall not be hereafter loaned or given to or in aid of any person, association, company, corporation or municipality; nor shall the State become the owner in whole or in part of any bank or a stockholder with others in any association, company, corporation or municipality."

As previously pointed out the 1956 Federal Highway

Act and Chapter 170 of the Tennessee Public Acts of 1957 provide payment for "non-betterment" cost and preclude the possibility of the utility getting any gain in removing the utility facilities. It was never intended that Article 2, Section 31 should be construed so that it would deprive the Legislature of its prerogative to change the policy of the State of Tennessee, when the utility received only "non-betterment" cost of relocation of its facilities. If such construction were widely applied it would mean the invalidating of many welfare statutes, unemployment compensation statutes, acts appropriating money for hospitals to match funds under the Federal program, and the invalidating of innumerable Tennessee Statutes relating to Social Welfare Legislation over the last twenty-five years.

SUMMARY.

In conclusion it is respectfully urged that this case presents a Federal question "substantial in character" as defined by the case of

Zucht v. King

260 U. S. 174, 177; 67 Law Ed. 194, 198.

The very existence of this petitioner is at stake, as has been set out in the sworn petitions made a part of the record. The Memphis Transit Company is a sick company, and generally speaking the entire Transit Industry is sick. In this case *all* of the relocation cost will be forced upon this petitioner as an unreasonable exercise of the police power under the decision of the Tennessee Supreme Court, whereas this Court decided in the Walters case, supra, that the moving of a Railroad's facilities amounted to taking property without due process of law.

where the N.C. & St. L. Railroad was required to pay *only fifty per cent* of the cost of relocating their tracks for the change of grade level.

In addition, many Transit Companies, small privately owned electric utilities, publicly owned Co-Ops, water companies, sewerage and gas districts and other small utilities will be forced into bankruptcy because they are unable to pay the cost of relocation of their facilities forced upon them by the impact of the unprecedented new Highway Program.

In addition larger utilities who can withstand the financial impact of the blow and recover their losses through increased utility rates will have their property rights taken under an unreasonable exercise of the police power. (It was decided that a Utility's right of occupancy is a vested right under the Federal Constitution in Russell v. Sebastian, 223 U. S. 195; 58 Law Ed. 912, and many other cases cited therein.) The cost to Utilities riders and users in Tennessee alone will run into the millions, as set forth in the original bill likewise a part of the record (Pages 5 to 19). Throughout the nation the amounts involved will run into hundreds of millions of dollars.

In addition there is the gross inequity of requiring the Utility users and riders of Tennessee and New Mexico to pay for these costs in increased utility rates, and again pay their Federal taxes to pay ninety per cent contribution on the Interstate System in States where payment of relocation costs are permitted. In other words, Tennessee citizens will be paying for these relocation costs 1.9 times when citizens in States where reimbursement costs

are allowed pay only one time.

Petitioner respectfully submits that this principle affects over ninety per cent of the citizens of the United States (all utility users or riders of any type), and that it is exceedingly important that this Court hand down a decision in keeping with the Congressional intent of the 1956 Federal Highway Act, and the 17 State Legislatures which have already passed Enabling Legislation to participate in the Federal Program. Undoubtedly other states will pass similar legislation.

The overwhelming weight of authority is against the three to two split decision in Tennessee, with Chief Justice Neil and Justice Tomlinson dissenting, and the New Mexico opinion on the proposition that acts similar to Chapter 170 of the Tennessee Acts of 1957 amount to a lending of the State's credit. If the principle set forth in the Tennessee decision was widely applied as pointed out earlier it would invalidate innumerable Welfare Statutes, Unemployment Compensation Statutes and other Social Legislation passed in the last twenty-five years. The practical economic application of the Tennessee decision results in an inequitable economic absurdity. The Constitutional interpretation rather than lending itself to protecting property rights under the Fifth and Fourteenth Amendments of the Federal Constitution results in an oppression of the rights of more than ninety per cent of the citizens in Tennessee and any other State, which might join the minority rule.

Petitioner respectfully submits that because of the hundreds of the millions of dollars involved in this question, and the percentage of the United States citizenry

affected that it is one of the most important legal cases of this decade, and one to which the wisdom of this Honorable Court should be directed.

Respectfully submitted,

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April 21st, 1959.

APPENDIX 1

STATE OF TENNESSEE VS. No. 79179 SOUTHERN BELL TELEPHONE, et al	In the Chancery Court, Part One, at Nashville

MEMORANDUM

The bill was filed by the State of Tennessee, through its Highway Commissioner, seeking a declaratory judgment as to the constitutionality of Chapter 170, Public Acts of 1957, for the State of Tennessee.

The State of Tennessee raised four constitutional objections to Chapter 170, Public Acts of 1957, as follows:

1. The Act is in violation of Article 2, Section 31, in that it provides for a lending of the State's credit.

2. Article 2, Section 8, is violated in that the Act creates unlawful classifications.

3. Article 1, Section 17, is violated in that the Act provides for a suit against the State.

4. Article 1, Section 20, is violated because the Act abrogates a contract between the State of Tennessee and the defendant Southern Bell Telephone Company.

The State also contended that the Act is void for indefiniteness.

The defendants demurred to the original bill and also challenged the right of the Commissioner of Highways to institute this suit.

Considering each ground of the demurrer separately, this Court finds as follows:

1. The grounds of the demurrers challenging the right and authority of the Highway Commissioner to maintain this suit is overruled, as he is the State Official charged by law with the administration of the Highway Department, and he has not only the right but the duty to challenge the constitutionality of Chapter 170, Public Acts of 1957, so that his rights and interests, as an official of the State of Tennessee, and the rights and interest of the people of the State may be protected. The Commissioner is to be commended for instituting this declaratory judgment lawsuit.

2. The first constitutional objection to Chapter 170, Public Acts of 1957, is that it is in violation of Article 2, Section 31 of the Constitution of the State of Tennessee, which prohibits the lending of the State's credit. This Court finds that Chapter 170 authorizes the expenditures of public funds for a public purpose and is not a lending of the State's credit in violation of Article 2, Section 31. The basic test as to whether an expenditure of public funds is a lending of the State's credit is whether or not such expenditure is for a public purpose. (Bedford County Hospital v. Browning, 169 Tenn. 227.)

The expenditures required by Chapter 170 do not constitute public aid for private purposes, but are for a public purpose and the determination of where the financial burden of such public purposes shall fall is a matter for the determination of the legislature, not the Courts.

Since the legislature of the State has taken the posi-

tion that the public welfare requires the State to participate with the Federal Government to build for the State and its people additional highway facilities, this Court cannot interfere without substituting its judgment upon a matter of policy for that of the Legislature.

The relocation of utilities facilities to accommodate construction of Federal aid highways is not in the interest of the utilities, nor do they benefit therefrom. Under Chapter 170, the utilities involved are placed in status quo. They, the public utilities, are not permitted to benefit under Chapter 170.

3. The classification of highways as set out in Chapter 170 does not violate the equal protection clause of Article 2, Section 3, of the Tennessee Constitution as being arbitrary, discriminatory and unreasonable, and therefore class legislation in violation of the equal protection clause of the Constitution of the State of Tennessee.

The State has no standing to invoke this equal protection clause because the equal protection clause relates to equality between persons only and not between areas. The classification under Chapter 170 is territorial, not personal.

Further, the extent to which reimbursement for relocation costs shall be granted rests in the discretion of the Legislature. (State v. Manley, 98 Tenn. 665) If any possible reason can be conceived to justify the classification contained in a legislative enactment, it will be upheld and deemed reasonable. (McDonnell v. Knoxville, 172 Tenn. 190)

4. Chapter 170 does not violate Article 1, Section 17 because of its arbitration provision. Article 1, Section 17 of the Constitution specifically provides: "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct." Through Chapter 170 the State has given its consent in the manner provided therein.

5. Chapter 170 does not violate Article 1, Section 20 of the Constitution. This section does not prevent the Legislature from abrogating a contract. The contract clause protects parties dealing with the State, but does not affect the validity of statutes releasing obligations due the State or any of its political subdivisions.

6. This Court is of the opinion that Chapter 170 is not void for indefinitances. The Act sets out a definite procedure and left the application thereof to the Highway Commissioner.

For the above reasons the demurrers are sustained on all grounds, except as to the ground challenging the right of the Commisioner of Highways to bring this suit, as to that ground alone the demurrer is overruled.

Decree accordingly.

NED LENTZ, Chancellor

This January 22, 1958.

APPENDIX 2

STATE OF TENNESSEE EX REL v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, ET AL	DAVIDSON EQUITY. Hon. Ned Lentz, Chancellor

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OPINION

The State, through its Commissioner of Highways has appealed from the Chancery Court of Davidson County, which upheld the validity and constitutionality of Chapter 170, Public Acts of 1957.

This Act provides for the State to reimburse utilities for the relocation of their facilities located on publicly

owned rights of way when necessary due to the construction of interstate highways, and for the reimbursement of utilities for the relocation of utility facilities located on publicly owned rights of way when necessary due to the construction of any highway project which is built with Federal-aid funds, provided that the utility shows hardship to the extent that its financial structure is impaired, or its rates are increased as a result of bearing the cost of relocation, and in the event of disagreement between the Commissioner of Highways and any utility, as to whether the utility is entitled to reimbursement, under Sections 1 and 2 certain controversies must be submitted to arbitration.

The Commissioner attacked the constitutionality of this Act by filing a bill for a declaratory judgment seeking a declaration as to his rights, duties, and interests therein. The public act is alleged to be unconstitutional, violating Article II, Section 31, which forbids the use of the State's credit to or in aid of corporations and others; Article XI, Section 8, which prohibits unreasonable legislative classifications, laws favoring individuals and laws granting rights, immunities, privileges, or exemptions; Article I, Section 17, which prohibits suits against the State; and Article I, Section 20, which prevents the impairment of contracts. The bill, as amended, also charges that the Act is void for indefiniteness.

The suit was brought against the Southern Bell Telephone and Telegraph Company, which answered the bill. Numerous private corporations, individuals, municipalities and cooperatives were allowed to intervene. All filed demurrers and the company was granted leave to withdraw its answer and file a demurrer.

The trial court sustained the demurrers except as to the right of the Commissioner to institute the suit and held that Chapter 170, does not violate Article II, Section 31 of the State Constitution, and that the expenditures therein provided for are for a public purpose. It is insisted on behalf of the State that the effect of said Chapter 170 is to pledge the State's credit to, or in aid of persons, corporations and municipalities. *In the case* now before us we find the poles and other facilities on the public highway without charge and holding a mere privilege for this use.

The test of the legislation is whether it comes within the prohibitory language and intent of Article II, Section 31.

It will be noted that in Article II, Section 31, the Constitution expressly prohibits the State's credit to, and in aid, not only of persons, corporations but municipalities as well.

Now, with this situation in mind this statute directing the expenditures of State funds to reimburse utilities for adjusting or removing their facilities from publicly owned right of way so that a State highway may be improved is primarily for the benefit of subscribers of utilities or their stockholders, and is neither a State nor a public purpose.

It has been generally held that these utilities are required to remove their facilities from publicly owned rights of way where necessary to improve State highways, at their own expense. 52 *Am. Jur.* 64, *Telegraph and Telephones, Sections* 34, 23, 33, 37, 50; *N.C. & St. L. Ry. v.*

Drainage District, 149 *Tenn.* 490; 261 *S. W.* 975; *Southern Bell Tel. & Tel. Co. v. State of Florida Ex Rel., etc.*, 75 *So. 2d* 796; *Southern Bell Tel. & Tel. Co. v. Commonwealth et al.* 266 *S. W.* (2*nd*) 308; *Tennessee v. United States, et al.* decided May 26, 1958. (Sixth Circuit Court of Appeals, and numerous other authorities.

Article II, Section 29, of our Constitution is permissive under certain conditions while Section 31 is prohibitory. The test of Article II, Section 29, is whether the expenditure of public funds is for a public purpose. *McConnell v. City of Lebanon*, (opinion filed in Nashville, May 2, 1958.)

Under Article II, Section 31, the expenditure must be for a State purpose, which function the state performs for its general public, agencies and instrumentalities of the State for the accomplishment of a State purpose under State control; and the State must have the "... right of use ..." of the property upon which the fund is expended. *Bedford County Hospital v. Browning.* 189 *Tenn.* 227, 255 *S. W.* (2*nd*) 4; *Baker v. Hickman County*, 164 *Tenn.* 294, 47 *S. W.* (2*nd*) 1090; *Mulkey v. Quillian*, 100 *S. W.* 2*nd* 268.

The use of State credit for reimbursing utilities for removing their facilities from publicly owned right of way fails to serve a State purpose and is not for a public purpose. *Mulkey v. Quillian, supra.*

In *Southern Bell Tel. & Tel. Co. v Commonwealth* (1954) 266 *S.W. 2d* 308, (*Kentucky*) *the Court said*:

"We think, fairly and reasonably construed, the removal and relocation of the poles and lines at

appellant's expense may be justified under the specific provisions of the grant. The term "so as not to obstruct the same" unquestionably relates to the obstruction of improvement, construction, and reconstruction of the state's highways as well as obstruction of travel upon completed highways. . . . If construed as requiring removal and relocation at the expense of the state, the franchise was in violation of Article II, Section 33, of our Third Constitution, which was carried over into Section 177 of our present Constitution, and provided:

'The credit of this Commonwealth shall not be given or loaned in aid of any person, association, municipality, or corporation.' "

The fact that the Legislature of this State has enacted a law which was not present in the Kentucky case authorizing such expenditures of public monies neither adds to, nor detracts from the force of the Kentucky decision.

If the Legislature is without authority under the Constitution to enact a law, the situation is the same as though there were no attempted enactment. Since the Constitution forbids the State from giving, or lending its credit ". . . to or in aid of any person, association, company, corporation, or municipality," it is immaterial whether there is an attempt to have public monies paid out under the guise of legislative sanction.

Note: The Kentucky case was decided on another point. The question of lending the State's credit was neither briefed nor argued.

We think that the basic test under this Section of our Constitution is whether the expenditure is for a State purpose. In the present case the primary purpose served by the expenditure is for the convenience and benefit of the utilities, the purpose cannot be public. In this connection see *Mulkey v. Quillian, supra.*

In *Bedford County Hospital v. Browning, Supra.* this Court said, referring to Article II, Section 31:

> "The obvious purpose of this Section of our Constitution was to prevent the State from using its *credit as a gratuity or donation to any person, corporation, or municipality.* . . . This grant does not constitute a gratuity or donation of State credit, as under the terms of the Act itself this constitutes performance of public duties, and with no right to reap *individual profit.*

The Court states three reasons in concluding that the State Hospital Act did not violate Article II, Section 31, as follows:

> "(1) That the Act is for the accomplishment of not a public but a State purpose as well.
>
> "(2) That the hospital become the agencies and instrumentalities of the State for the accomplishment of such State purposes under State control, regulation and supervision.
>
> "(3) That the objection that the sovereign has no title to the institutions is met by the proposition that it will continue to have the use of the hospitals for the benefit of the people of the entire State."

In the Bedford County Hospital case the Court pointed out with reference to Article II, Sections 29 and 31 that

the Sections are different in purposes, in effect and in wording.

In the case of *Oswego etc v. State*, 226 *N.Y.* 351, 124 *N.E.* 8. is not in point. The whole basis of Justice Cordozo's opinion is that the Legislature may enact Acts when equity demands. The facts in the Oswego case showed that equity did demand that the state step in and do equity. We have no question of equity in the present case. The user of the defendants was only permissive.

Certain factual situations were set out in the bill which must be taken as admitted on demurrer, which among other things, appears that the telephone company owns and operates a vast communication system for profit in the State of Tennessee, and a part of its facilities, including poles, wires, underground conduits, and other equipment are installed in, upon and under publicly owned rights of way under *Section* 65-2105 *T.C.A.* The public rights of way have been acquired at an enormous cost to the citizens and taxpayers of the State, and the Telephone Company, as well as other privately and publicly owned utilities, have used and occupied such rights of way without cost, or expense to them.

The bill charges that in order to participate in the interstate highway program, it was necessary for the State to appropriate and raise large sums of money, necessitating the enactment of Chapter 264, Public Acts of 1957, authorizing the State Funding Board to issue bonds in the amount not exceeding $30,000,000.00; that the department has estimated that the cost of relocating utility facilities in connection with interstate highway projects

in Tennessee will amount to $15,370,000.00, which is more than one half of the amount which the Legislature authorized the State to borrow for highway purposes under said Chapter 264, Public Acts of 1957.

We think the Commissioner of Highways had full authority to institute this suit. *Cummings v. Beeler*, 189 *Tenn.* 151, 223 *S. W.* (2*nd*) 913.

The Court being of the opinion that Chapter 170, Public Acts of 1957 offends and violates Article II, Section 31, of the Constitution of Tennessee, it is not necessary for us to discuss or decide other serious questions raised by the State on this appeal.

It results that the decree of the Chancellor will be reversed and the cause remanded to the Chancery Court of Davidson County with directions to enter such orders and decrees as may be necessary in the enforcement of this opinion.

/s/ Prewitt
Prewitt, J.

Burnett, Swepston, J. J. concurring
Tomlinson, J., dissenting
Neil, C. J. not participating.

APPENDIX 3

IN THE SUPREME COURT OF TENNESSEE

STATE OF TENNESSEE EX REL. VERSUS— SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, et al.	DAVIDSON EQUITY Honorable Ned Lentz, Chancellor

DISSENTING OPINION

Notwithstanding the risk of being considered presumptuous, I will observe at the outset that the majority opinion is exceedingly well reasoned, and is quite persuasive. In my opinion, however, its conclusion overlooks what I think is the controlling basic principle.

It is true that the poles were placed upon the right of way of the public highways by permission of the State, and without the Telephone Company paying any money consideration for such use of its right of way. It is erroneous, however, to think that such permissive use was animated solely by a purely charitable or "big hearted", so to speak, spirit, upon the part of the State. The benefits rendered the citizens of the State by reason of the existence of telephone facilities, the means and rapidity of communications, etc. afforded thereby, and resulting in the beneficial forwarding of the public welfare, undoubtedly induced the State to permit and, in fact, impliedly, to invite, the use of the untraveled portion of the highway for the erection of these poles and other equipment. Most of this statement is recited forcibly, and in vivid detail, by this Court in Frazier v. Telephone Company, 115 Tenn., 416, 424-425.

In fact, if we presume an absence of public benefit in the granting of such permissive use, then there might very appropriately be asked the question as to what authority the State had in the first place to permit the use of its property solely for the private benefit of the Telephone Company?

Such use being permissive, the law was, and is, of course, in the absence of statute, that when such poles, etc. interferred with the enlarging, repairing, improving, etc. of the public highway it then became the duty of the Telephone Company to move its poles without expense to the State. A special contract upon the part of the Telephone Company to do just that added nothing to the obligation it already had, in the absence of statute. Such contract was simply declaratory of that duty. So, if there was no statute here, the Kentucky case referred to in the majority opinion would be quite persuasive upon me.

But we do have a statute, the one which is stricken down by the majority opinion,—Chapter 170, Public Acts of 1957. That statute contemplates the re-building, enlarging, etc. upon a very vast scale many, many miles of the most important federal aid highways in this State. The re-building, etc. of such highways is so patently a state purpose as to make it pedantic to cite authorities in support of the statement.

To remove trees, buildings, or set fast large rocks, or whatever it may be, from that right of way in order that such highway may be constructed is necessarily part and parcel of the construction of the highway. Such removal is, therefore, the doing of an act for the accomplishment of a state purpose. Now, in so far as I can reason it, there

is no difference in this respect between the removal of a telephone pole and the removal of other obstacles in the re-building, etc. of such public highway.

Does the fact that this statute proposes to reimburse the Telephone Company for the expense incurred in removing its poles render it unconstitutional because, in the absence of such statute, the Company must remove these poles without reimbursement? The majority opinion is that this fact does render the statute unconstitutional because, so the majority opinion says, it contravenes Article 2, Section 31, reading as follows:

> "Acts forbidden the State.—The credit of this State shall not be hereafter loaned or given to or in aid of any person, association, company, corporation or municipality."

The statute involved in Baker v. Hickman County, 164 Tenn., 294, 308-309 proposed to reimburse Hickman County for a financial obligation of Hickman County incurred in the building of a highway and for which the State was not, in the absence of such statute, legally liable. It was insisted that the statute violated Article 2, Section 31 above quoted. But this Court held that this constitutional inhibition was not violated by recognition upon the part of the General Assembly that the "counties have a claim upon the state for reimbursement, founded on equity and justice, though not enforcible in a court of law even if the state were not immune from suit". It accordingly sustained the statute directing that Hickman County be reimbursed.

Oehmig v. City of Chattanooga, 168 Tenn., 618, 624, was dealing with the question of whether the statute

there involved violated Sections 28 and 29 of this article of our Constitution. In holding that it did not this Court followed the ruling stated and hereinbefore quoted in Baker v. Hickman County, supra. The statement in the Oehmig case, in following Baker v. Hickman County, is pertinent here, and is this:

> "The implied restraint against legislative appropriation of municipal funds for other than corporate purposes does not extend to any expenditure required to meet obligations which the city assumed upon equitable or moral considerations, as in this case the obligation attending the apportionment of rights and the adjustment of obligations incident to the annexation of Riverview."

As late as Watauga Valley Gas Company v. Evans, 192 Tenn., 413,420, this Court again recognized the existence of this rule, and said by quoting from the Wisconsin case there mentioned that a holding to the contrary

> "would prevent the state from being as honest as it could afford, notwithstanding its desire to make restitution so far as possible . . . the state may at its pleasure recognize such of its moral obligations as it feels able to discharge . . ."

Unless we repudiate the ruling of the cases from which I have just quoted, is it not true that we must hold that Chapter 170 of the Public Acts of 1957 violates Article 2, Section 31 of our Constitution, provided it can be said with intellectual honesty that there is a rational basis for a conclusion that the reimbursement therein directed is (to quote from the Baker case) "founded on equity and justice, though not enforceable in a court of

law even if the State were not immune from suit''?

It is not a question of whether either one of two opposite views may be taken as to whether equity and justice supports the reimbursement allowance. It may very well be that had I been a member of the Legislature I would have thought that the weight of reasoning was against the allowing of the reimbursement on the basis of equity and justice. But I have no right to substitute my views as a judge for those of the Legislature. So, if it can be said with reason that there is a rational basis for the Legislature's belief that such reimbursement was in keeping with equity and justice then it would be held, as I see it, that this statute does not violate Article 2, Section 31.

The report of certain United States Senators from its Senate Committee on Public Works as carried in the brief of appellees, and identified therein as Senate Report No. 1407, 85th Congress, Second Session, and in the accuracy of which as therein quoted I have absolute confidence, is as follows:

> "It is submitted that there was valid reason for the States to amend their laws. The conditions under which utilities agreed to bear the burden of relocation costs disappeared, or at the very least were radically and substantially changed, with the enactment of Federal-Aid Highway Act of 1956.
>
> "In the old days, such relocation costs were encountered on a gradual and small scale. They embraced relatively minor operations in type. Their sum total was within the reach of the utilities' ability to fund same, whether the utility was publicly, privately, or cooperatively owned.

"Under the act of 1956 all of this was heavily changed. A crash program of unprecendented scale was inaugurated. Federal funds available for highway construction rocketed from $875,000 to $2 billion within a single year. Greater increases are scheduled for following years. In addition, the type of construction changed. The modern, multilane, high speed traffic ways require rights-of-way of spectacular width; cloverleafs, over-passes, and underpasses, and long distances thereof through urban areas, bringing expressways to the heart of metropolitan centers.

"These changes brought about inordinate expenditures for moving vast amounts of facilities at a great cost to the users of the utilities. They bring about a tremendously different treatment than when highway improvement was a local convenience and local cost, relatively speaking."

It cannot be concluded that those statements said to be in said report overstate the situation. The United States Congress accepted it as true.

My opinion is that there is a rational basis for the self evident conclusion of our Legislature that the reimbursement to the Telephone Company for the expenses incurred in moving these poles in the manner provided by Chapter 170, Public Acts of 1957 is a direction for reimbursement founded on equity and justice. This is the basic principle which I feel the majority opinion has erroneously failed to give effect. Applying that principle, as I think we should, it would have to be concluded, in my opinion, that this statute does not break through the restraints of Article 2, Section 31 of our Constitution.

Cited in the brief of appellees, and quoted from, are the

opinions of other states holding that statutes providing for reimbursement of the respective utility concerns under the circumstances of the case at bay are not statutes violating a constitutional prohibition against the lending of the credit, etc. of the state to aid of individuals or corporations. These decisions are Opinion of the Justices, 132 A. (2d) 440, 443 (Maine); Opinion of the Justices, 132 A. (2d) 613, 615, 616 (New Hampshire).

Other grounds of attack upon the 1957 Act are made by the appellants. The decision of each of these questions is pretermitted by the majority opinion because its decision that the statute in question violates Article 2, Section 31, is regarded by it as conclusive of the case. Obviously, therefore, it would be idle for me to consider these additional grounds of attack in this opinion wherein I feel compelled, for the reasons stated, to respectfully dissent from the majority holding.

TOMLINSON, J.

APPENDIX 4

STATE OF TENNESSEE EX REL. v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, et al	DAVIDSON EQUITY Hon. Ned Lentz, Chancellor

Solicitors for Appellees

W. W. Kennerly, Knoxville, Tenn.
George T. Lewis, Jr., Memphis, Tenn.
W. D. Spears, Chattanooga, Tenn.
A. A. Kelly, South Pittsburg, Tenn.
Wesley P. Flatt, Jr., Cookeville, Tenn.
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Robert H. Jennings, Nashville, Tenn.
Wm. A. Sands, Memphis, Tennessee
C. A. Cameron, Adamsville, Tenn.
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Solicitors for Appellant

Jack Wilson, Asst. Attorney General
Nashville, Tenn.
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MEMORANDUM ON PETITIONS TO REHEAR

Since the opinion heretofore filed on September 1, 1958, was adopted by a majority of the Court, Justices Burnett and Swepston concurring with Justice Tomlinson dissenting, and Chief Justice Neil not participating, the cause was set down for reargument on December 1, 1958, in which rehearing the Chief Justice participated

Now, since said opinion was filed another State has spoken on the subject, to-wit, New Mexico, Pacific, in an opinion dated November 14, 1958, the opinion having been written by Justice Shillinglaw, of that Court, which opinion was unanimous and in which they quote extensively from our opinion heretofore filed September 1, 1958. That Court struck down a similar statute as the one involved in this cause as being offensive to the Constitution of New Mexico.

We quote from that opinion:

"We think that the basic test under this Section of our Constitution is whether the expenditure is for a State purpose. In the present case the primary purpose served by the expenditure is for the convenience and benefit of the utilities, the purpose cannot be public."

And again we quote:

"In conclusion, we would answer the main argument of the appellee that relocation of these utilities is a public governmental function by stating that the construction of highways is unquestionably a public governmental function but that we disagree as to relocation of utility facilities. Highways are constructed by the state on state-owned rights-of-way for the use of the public. The Southern Union Gas Company, in laying its gas lines, is acting solely for the benefit of the utility. The line is the property of the utility and to be used solely by it, neither the state nor the public having any right to use these lines. The Southern Union Gas Company is not a subordinate governmental agency nor is it fulfilling a governmental function although it is serving a highly useful purpose in the great American free

enterprise tradition by furnishing for profit an essential commodity to the people of this state."

We further quote from the New Mexico case:

"In reply to the appellee's contention that the legislature can change the common law to provide for future payment of utility relocation costs, "it is beyond question that the common law is subject to change by statute. That such change may not offend the constitution is equally true. Public policy of this state is determined by the Legislature but such declarations of policy are restricted by the limitations of our constitution. Flaska v. State, 51 N.M. 13, 177 P. 2d 174."

The majority of this Court adheres to our former opinion delivered on September 1, 1958, in which we held said Chapter 170, Public Acts of 1957 unconstitutional.

The petitions to rehear, after having been duly heard and considered by the Court, are overruled.

PREWITT, J.

Justices Burnett and Swepston
concurring
Chief Justice Neil and Justice
Tomlinson, dissenting.

Office of Clerk of the Supreme Court

For the Middle Division of the State of Tennessee

I, DAVID S. LANSDEN, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the opinion of said Court, pronounced at

its December term, 1958, in case of State ex rel against Southern Bell Tel. & Tel. Co. as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the twelfth day of December, 1958.

DAVID S. LANSDEN, Clerk.

APPENDIX 5

STATE OF TENNESSEE EX REL.
v.
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, et al.

DAVIDSON EQUITY

CONCURRING OPINION

I concur in the result of the majority opinion for the following reasons.

The removal and relocation of the facilities of privately owned so-called public utilities is not a proper cost to the State of the construction of a highway, such as is the removal of natural objects consisting of rock, soil, trees, etc.: to the contrary, such facilities have all been placed there with full knowledge that the owners may be required at any time in the future to relocate them and at their own expense; such has uniformly been done up to the present.

The only reason suggested as a justification for the Legislative Act in question is the asserted impact of the so-called "crash program" for constructing an Interstate Highway with Federal and State funds.

Conceding that for the accomplishment of the final objective it will require the expenditure by some utilities extraordinarily large sums, nevertheless as I understand it, this will be done over a period of as much as thirteen years.

Whatever the time, however, the condition is only a

difference in degree of cost rather than a change in nature of the respective obligations of the State and the utility to each other. It is asserted that no benefit accrues to the utility from the removal and relocation. I am not prophetic enough either to agree or disagree with that statement; but the same assertion could have been made in the past with reference to any relocations. Again it is asserted that no benefit will accrue from reimbursement under the statute. With that I cannot agree; it can hardly be said that being relieved of the cost of this legal obligation would not be a benefit.

For these reasons the statute does not serve a public purpose.

If by its fiat the Legislature can authorize the expenditure of these large sums on properties in which the State has no financial interest and no control other than the regulatory powers over any corporation "affected with a public interest", then I see no way to restrain the Legislature within the limits of Art. II, Sec. 31 of our State Constitution, whenever it may decide to do equity according to its own conception.

Mr. Justice Burnett requests that I state that he fully concurs herein.

John E. Swepston, J.

Office of Clerk of the Supreme Court

For the Middle Division of the State of Tennessee

I, DAVID S. LANSDEN, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and com-

plete copy of the opinion of said Court, pronounced at its December term, 1958, in case of State ex rel against Southern Bell Tel. & Tel. Co. as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the twelfth day of December, 1958.

DAVID S. LANSDEN, Clerk

APPENDIX 6

STATE OF TENNESSEE EX REL.
V.
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, et al.

DAVIDSON EQUITY

DISSENTING OPINION BY A. B. NEIL, C. J.

The writer of this dissenting opinion did not participate in the original hearing of this cause due to his absence in presiding over a certain Court of Impeachment which was in progress at that time and which lasted for several weeks.

The defendant in error, Southern Bell Telephone Company, filed its motion for a rehearing which was granted and the cause set down for a rehearing. Oral argument has been heard by counsel for the State and the Southern Bell Company and several counsel for the interveners. The result of this rehearing has been to review the original issues and whether or not there is error in the majority opinion.

I think there is unanimity of opinion that this is a proper case for a declaratory judgment.

With all deference to the majority view I cannot agree that the Act is *not in furtherance of a public purpose.* At the very outset I cannot forbear asking the question: why is this not a valid exercise of the police power of the State by the Legislature; and so adjudged in *Nichol* v. *Mayor of Nashville,* infra?

In considering whether or not it is for a public purpose we should consider that which gave rise to its enactment. The Congress of the United States had enacted legislation looking to the building of super interstate highways wherein provision was made for participation by the State of Tennessee (and all other states) in the building of this vast system of public roads. Incidentally the system was in aid of national defense. Among other things the "Federal-aid highway projects" provided that the cost of relocation of telephone facilities, as well as other public service corporations, would be shared on a percentage basis.

Thus it is that the sole issue before the Court is whether the General Assembly had the power to provide for reimbursement of public utilites for the cost of relocating their facilities when necessitated by Federal-aid highway construction. Now if the Act is not in furtherance of a public purpose it must be adjudged unconstitutional. It seems to me that it is not unconstitutional under our cases, and also cases from foreign jurisdictions; it is not a lending of the State's credit in aid of this public service corporation in violation of Article 2, Section 31 of the Constitution.

In an early case, *Nichol* v. *Mayor of Nashville*, 28 Tenn., 252, it was held that a subscription by the City of Nashville to stock in the N. C. & St. L. Railway, which ran at that time from Nashville to Chattanooga, *was for a public purpose*. There are numerous cases to the same effect, which need not be cited at this time. This opinion by Judge Turley in 1848 was a judicial pronouncement as to the public policy of the State with regard to the

lending of the State's credit to public service corporations. It was a constitutional exercise of the State's police power. It was cited and followed by this Court in *McConnell* v. *Lebanon* (recently decided in a divided opinion) in which it was held that an Act authorizing the issuance of bonds by the Town of Lebanon in aid of a business enterprise (a luggage factory) was for a "public purpose", and not in violation of Article 2, Section 31 of the Constitution. The purpose was to provide employment for a segment of the town's population and to increase the standard of living.

If it is constitutional for a municipality to thus lend financial aid to the building of a railroad (*Nichol* v. *Mayor of Nashville*, supra) and to issue bonds in aid of a luggage factory, the same to become a debt upon the said municipality, I fail to see why the participation by the State with the Federal Government in building a system of interstate roads should be held invalid on the ground that it is not for a public purpose. Moreover the decided weight of authority, as appears from the highest appellate courts of other jurisdictions, holds that the statute herein assailed is not in violation of Article 2, Section 31 of our Constitution; and these courts were construing statutes similar in all respects to our own as well as constitutional provisions similar in language to that of this State. See *Opinion of Justices* (New Hampshire), 132 A. (2d), 613; *Opinion of Justices* (Maine), 132 A. (2d), 440; *Minneapolis Gas Co.* v. *Zimmerman, Commissioner etc.*, decided July 11, 1958, and other cases.

Moreover the building of super highways, express roads and the like has become a matter of public necessity due to the inadequacy of our present highways in

every state to accommodate motor vehicular traffic. Every highway is clogged with automobiles, and they are still coming off of assembly lines at the rate of 500,000 per month. Regarding the unquestioned need for the betterment of public roads we take judicial notice of the foregoing facts and also this further fact that this State has been for a number of years engaged in rebuilding, resurfacing and widening so-called "farm to market" roads.

Every opinion of this Court within my knowledge has said either expressly, or by clear implication, that the building of public roads is a public purpose. *Baker* v. *Hickman County*, 164 Tenn., 294. It was there insisted that the statute which authorized the reimbursement of the counties for debts incurred in the erection of highways and that the "counties have a claim upon the State for reimbursement" is not in violation of Article 2, Section 31 of the Constitution.

The obligation of the State was "founded in equity and justice". Why should not this principle be recognized in the case at bar? If, as it appears now that the Legislature has seen fit to authorize the State Highway Commissioner to cooperate in the Federal-aid highway program the result is that this State is not lending aid, or credit, to a private corporation but is primarily engaged in building a system of public roads, which is, and has always been, regarded as a public purpose.

We know that the building of this vast system of highways by Federal Act will necessitate the relocation of telephone wires and cables from the State's right of way.

In other words they must "move over" in aid of the building of highway construction.

At this point I wish to digress to say that the insistence made by counsel that the use of the highway by the telephone company is permissive only, and remain at the sufferance of the State, is illusory. In the beginning it may have been permissive, but it is wholly inequitable and very unjust for the State to encourage the utility to occupy the highway, and expend millions of dollars in perfecting its service for the public and then order them "to get off the road." Under well settled principles of equity the right which in the beginning was permissive has ripened into an easement which is a valid property right. Moreover they are there by virtue of Code Section 55-2105, and are "transmitting intelligence." It cannot be doubted that the State has a vital interest in their business. Of course, the State could move against them under the police power, but this power could not be exercised arbitrarily. *City of Chattanooga* v. *Tenn. Electric Power Co.*, 172 Tenn., 324, 112 S. W. (2d), 385; *Southern Bell Tel. & Tel. Co.* v. *City of Nashville*, 35 Tenn. App., 207, 243 S. W. (2d), 617; *Frazier v. Telephone Co.*, 113 Tenn., 415, [illegible] S. W., 828; and *Russell* v. *Sabastian*, 237 U. S., 193, 59 L. Ed., 912.

The authorities cited on the State's brief sustaining their contention that "utilities have a non-compensable duty to remove their facilities from publicly owned rights of way when necessary to improve State highways" is the general rule. But the Legislature may assume this obligation when it is in the furtherance of a public purpose. Moreover, the Legislature is not forbidden by the Constitution to provide for payments which it deems

equitable and just. *Baker* v. *Hickman County*, supra; and *Oehmig* v. *City of Chattanooga*, 168 Tenn., 618.

Conceding that the contract between the State and Southern Bell is valid and binding, the Legislature is free to release it from its obligations to pay the cost of relocating its facilities under circumstances which are in the public interest, and do not violate the Constitution. The recent case of *Minneapolis T&T Co.* v. *Zimmerman*, supra, and authorities cited therein, is conclusive of this question as well as all other questions made on this appeal. I am not influenced by the recent opinion by the New Mexico Supreme Court (*State Highway Commission etc.* v. *Mountain States Tel. & Tel. Co., et al*, decided January 14, 1958), because it is in conflicting with what I consider the public policy of this State as reflected in *Nichol* v. *Mayor of Nashville*, and *McConnell* v. *Lebanon*, supra.

Coming now to the alleged unlawful classification under Section 2 of Chapter 170, Public Acts of 1957, it does not violate the equal protection clause of the Constitution (Article 11, Section 8) because the Legislature is privileged to require the State to assume some specific duties and at the same time exempt it from other duties; it may consent to pay some costs and exempt it from paying other costs. But aside from the foregoing expression, there is a presumption that the classification made in the Act herein assailed *is reasonable*. *McConnell* v. *City of Knoxville*, 172 Tenn., 190; *Motley* v. *State*, 125 Tenn., 547; and *Sun Coal Co.* v. *State*, 157 Tenn., 522.

Finally my view of the question of alleged lending of the State's credit to Southern Bell, I feel that in truth

and in fact the State is giving practical and valuable aid to highway construction. By way of illustration, if the cost of relocating these facilities should be ten million dollars, there will be refunded by the United States Government the sum of nine million dollars. The balance of one million dollars indebtedness incurred by the State should be considered as its contribution in that amount to the building of the Federal-aid highway system. The traveling public of this State will have the benefit of this improved system of highways at comparatively nominal cost, or the cost of only ten (10%) per cent of the overall cost of the project. It should not be thought of as a donation to the telephone company because it is an expenditure for State highway construction, which is clearly in the public interest.

Furthermore I cannot agree with the majority opinion that the statute confers upon this utility benefits in violation of constitutional inhibitions (Article 2, Section 31). The Federal "Reimbursement Act" provides that the "Cost of relocation means the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility." By the very language of the Act the right to any reimbursement is confined to *non-betterment cost*. As the Supreme Court of Minnesota has so clearly pointed out, "The reimbursement merely restores plaintiff utility to the same positon it was prior to the relocation of its facilities." See *Minneapolis* v. *Zimmerman*, supra. The foregoing statement cannot be successfully controverted, and it seems to me that it is conclusive of the proposition that the State is not lending its credit in violation of the Constitution.

The majority opinion of this Court, which strikes down Chapter 170 of the Public Acts of 1957, deprives this State of any benefits under the Federal-aid highway project and at the same time the citizens and tax payers of Tennessee are onerated with a tax burden levied by the Federal Government for building super highways in other states. The Legislature must have foreseen the foregoing injurious consequences in the event legislation was not enacted to guard against such an injustice.

Of course, we cannot be concerned as to whether a statute is wise or unwise. But it is not improper to consider the purpose of an act which shows on its face that it was not intended to confer a private benefit, i.e. the lending of the State's credit to a private corporation, to the manifest prejudice of the public interest.

Under universal canons of statutory construction every act is presumed to be constitutional. Indeed it is the duty of the courts to resolve every doubt in favor of the act and sustain it if it is possible to do so.

For the foregoing reasons I respectfully dissent from the majority opinion.

NEIL, C. J.

Office of Clerk of the Supreme Court

For the Middle Division of the State of Tennessee

I, DAVID S. LANSDEN, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the opinion of said Court, pronounced at its

December term, 1958, in case of State ex rel against Southern Bell Tel. & Tel. Co. as appears of record now on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office in the Capitol at Nashville, on this, the twelfth day of December, 1958.

DAVID S. LANSDEN, Clerk.
ELSIE Y. PHILLIPS, D. C.

APPENDIX 7

STATE OF TENNESSEE, EX REL v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, et al.	DAVIDSON EQUITY. Honorable Ned Lentz, Chancellor

DISSENTING OPINION OF TOMLINSON, J.

In as much as the majority, after granting a rehearing, has adhered to its previous conclusions, I feel that I should herewith supplement the dissent which I wrote when the decision of the majority was first announced.

In my original dissent, I called attention to the fact that the Supreme Court of Maine and New Hampshire had adjudged a statute equivalent to our Chapter 170, Public Acts of 1957, not to be in violation of their respective constitutional provisions, forbidding the lending of the State's credit "in aid of any person, association, company, corporation or municipality". An identical adjudication on July 16, 1958 was announced by the Supreme Court of Minnesota in the Minneapolis Gas Company v. Zimmerman, Commissionor of Highways. The opinion has not yet appeared in the published reports.

There was also furnished to the members of this Court copies of opinions likewise so adjudging by Courts of original jurisdiction as follows:—"Idaho vs. Idaho Power Company et al, decided July 3, 1958, District Court; Texas vs. City of Austin, et al, decided August 14, 1958, District Court; State Highway Commissioner

of New Mexico vs. Mountain State Telephone Co. et al, decided January 14, 1958, District Court". Subsequently the New Mexico Supreme Court reversed, basing its conclusions heavily upon the majority opinion of our Court in the case at bar.

These decisions are worthy of consideration, I think, at least in connection with the controlling question of whether in its enactment of this statute, that reimbursement to the public utilities by the State for the "non-betterment" expenses incurred in moving these facilities is founded on equity and justice and, therefore, not in contravention of Article 2, Section 31 under the holding of our own decisions in Baker v. Hickman County, 164 Tenn., 294, 308-309, and Oehmig v. City of Chattanooga, 168 Tenn., 618, 624.

The majority opinion cites the Kentucky case therein mentioned. But in so doing, it was, in my opinion, begging the question. The Kentucky Court was not passing upon the constitutionality of a statute tested by a non lending of credit clause thereof. It was simply declaring the obligation of the utilities under the common law to move their facilities when their presence on the highway proved an obstruction in the re-building, etc. thereof. No one gainsays the soundness of such holding. But that has no bearing on the question here, towit, the constitutionality of our Chapter 170, Acts of 1957. I am informed that the Kentucky Legislature subsequently enacted a re-imbursement statute the equivalent of our Chapter 170. But, I have not checked this since it, standing alone, is not very material to our question.

The basis of the conclusion of the majority opinion is

that the expenditure for the moving of the facilities of the utilities is not for a state purpose because, so the majority says, "the primary purpose served by the expenditure is for the convenience and benefit of the utilities". In my opinion, that statement cannot successfully withstand analysis.

These various utilities now have their facilities on the rights-of-way of roads and streets by virtue of statutes and ordinances. By way of illustration, the telephone companies are there by virtue of Code Section 65-2105 because they are "transmitting intelligence". The State is most certainly interested in the rapid transmission of intelligence, news, etc. to its citizens. These benefits to the state, as observed in my original dissenting opinion, are noted in detail in Frazier v. Telephone Company, 115 Tenn., 416,424,425. The Minnesota case especially so comments on this particular benefit to the State, viz:

> "Clearly since the Cater decision in 1895, Minnesota has been definitely committed to the view that the use of rights-of-way by utilities for locating their facilities is one of the proper and primary purposes for which highways are designed even though their principal use is for travel and the transportation of persons and property. Furthermore, the import of that decision is a clear recognition that the use of highway rights-of-way for the transmission of public intelligence and public utility services confers important and direct benefits upon the public, and that such use is not solely for the benefit and convenience of the utilities. The soundness of the view that the placing of utility facilities upon a right-of-way is one of the proper uses of a highway benefiting the public is emphasized by the fact that convenience and economy result therefrom

to utility users, who are usually located near highways, and by the further fact that it is in the interest of the public welfare—in the view of our over-increasing population—to make full and efficient use of the land surface occupied by public roads."

Moreover, the utilities, having thus acquired by legislative enactment and ordinance the right to place its facilities upon the highways and streets, have thereby acquired "an easement, and as such is a property right—entitled to all of the constitutional protection afforded other property rights and contracts". City of Chattanooga v. Tennessee Electric Power Company, 172 Tenn., 524, 537.

Therefore, no citation to a decision of Court is necessary to verify the statement that a State has not the authority to arbitrarily order such utility to remove its facilities from such right-of-way. Its right to require such removal is based upon its police power when such removal becomes necessary in the rebuilding, enlarging, etc. of the public highway, or for other similar reason. To assert, therefore, that the removal of these facilities of the utilities from the right-of-way for such a reason is not for a state purpose is, in my opinion, to assert that which does not square with every day logic.

Nor can I agree with the statement in the majority opinion that "the primary purpose" of such moving of the facilities of the utility "is for the convenience and benefit of the utilities". To ask in what manner they are convenienced is, per se, to suggest the answer that they are not convenienced in any manner by being required to move their facilities.

And as to the alleged "benefit", to say that the utilities are benefited by such removal is to ignore the fact that reimbursement to the utility for the removal of its facilities is confined to such expense as is "properly attributable to such relocation after deducting therefrom any increase in the value of *the new facility and any salvage value derived from the old facility*". So it is that the "utilities' right to reimbursement is limited to *non betterment costs*". (Emphasis supplied.) Now, then, can the utility be benefited by being required to remove its facilities from the right-of-way? It has gained absolutely nothing.

By implication the original majority opinion seems to recognize it to be a fact that the constitutional prohibition against lending the state's credit would not be violated in this case if the statute were based upon the fact that it is in accord with justice and equity. I say this because the majority opinion, after reciting that the New York case of Oswego, etc. v. State, 12[illegible] N.E., 8, was correct in upholding the statute there involved because "the facts in the Oswego case showed that equity did demand that the State step in and do equity", then asserts that "we have no question of equity in the present case", meaning the case at bar. I am unable to draw any distinction between the case at bar and the Oswego case, supra.

As noted in my original dissent, the United States Congress thought that equity and justice required that the utilities be reimbursed to the extent of their non-betterment costs in the removal of their facilities from these rights-of-way. It thought that this "program on an unprecedented scale" in the building of interstate highways subjected these utilities to "a tremendously different

treatment" from that ever theretofore contemplated, and that the sum total of such costs might be beyond "the reach of the utilities' ability to fund the same, whether the utility was publicly, privately or cooperatively owned". The Courts of every State, except ours, and New Mexico, which followed our opinion, which have passed upon the question have been of the opinion that there is a rational basis in justice and equity for the reimbursement to the utilities of such non-betterment costs.

If all this were not enough to persuade the majority of this Court that regardless of individual views, there is a justification for thinking that there is a rational basis in justice and equity for the enactment by the Legislature of Chapter 170, as so many Courts and legislative bodies seem to think, then, in addition, this majority, it seems to me, must nevertheless take judicial knowledge of the fact that the tremendous costs of such removal of its facilities upon so gigantic a scale threatens many of our weaker utilities with bankruptcy if it has to pay this never before contemplated bill, and will place a never contemplated burden upon the financially stronger utilities who must pay the costs thereon in materially increased rates to those who are compelled to use its services, while such rate users in the other states except New Mexico are relieved of this additional burden.

All this, it seems to me, compels the conclusion that at least this is a justification for concluding that there is a rational basis in justice and equity for the enactment of this statute reimbursing the utilities to the extent of non-betterment costs, regardless of whether we individually disagree with that conclusion. And, it being a reasonable conclusion that there exists a rational basis in justice

and equity for such reimbursement, unless a great lot of Courts and legislative bodies are intellectually arbitrary in their thinking, this Court, in my opinion, is trespassing upon the prerogatives of the legislative branch of our government in striking down such statute because it does not agree with the view of the legislature that it is just and equitable to reimburse these utilities.

I am persuaded that the majority, in reaching its conclusion, was unconsciously, at least, influenced by assuming in its original opinion that:

> "... it was necessary for the State to appropriate and raise large sums of money, necessitating the enactment of Chapter 264, Public Acts of 1957, authorizing the State Funding Board to issue bonds in the amount not exceeding $30,000,000.00; that department has estimated that the cost of relocating utility facilities in connection with interstate highway projects in Tennessee will amount to $15,370,000.00, which is more than one half of the amount which the Legislature authorized the State to borrow for highway purposes under said Chapter 264, Public Acts of 1957".

The majority of my brothers must have then overlooked the fact that if our Chapter 170 is adjudged constitutional with the result that the State will, to the extent of the non-betterment costs, reimburse the utilities for the moving of their facilities, that then the United States Government will pay, or reimburse the State, to the extent of 90% of such costs. That is, if the costs of such moving is $15,370,000.00, as stated in the original opinion of the majority, then 90% thereof will be paid by the United States Government, and 10% by the State. The result would be that the entire costs to the

State would be about one and one-half million dollars instead of $15,370,000.00.

But with the adjudging of our Chapter 170 unconstitutional, the users of the utilities in Tennessee will, in the end, be compelled to pay in increased rates the entire $15,370,000.00, except as to such of the utilities as are forced out of business by reason of being required to pay such costs.

But still another burden will be added to the rate payers in Tennessee—and they compose about all of our people. It is summed up in the Pennsylvania case of Department of Highways v. Pennsylvania P.U. Comm., 136 A. (2d) 473, 477, as follows:

> "... Thus, if state 'A' receives from the federal government 90% of the cost of other utility relocations or inter-state highways because the policy of that state is to bear this cost, while state 'B' receives nothing from the federal government for utility relocations because its policy is not to bear this cost, the citizens of state 'B' will pay on their utility bills for utility relocations in their state, and will also pay in their federal gasoline tax for a part of the cost of relocating utilities in state 'A'."

This, in my opinion, is another reason that Chapter 170 of the Acts of 1957 has a basis in justice and equity and, therefore, for this reason, if for no other, is not contrary to Article 2, Section 31 forbidding this State from lending its credit in aid of any person, association, company, corporation or municipality. Such a situation is not the lending of its credit under our decisions hereinbefore mentioned:—Baker vs. Hickman County and Oehmig vs.

City of Chattanooga, supra. There is, I think, no way to avoid the conclusion that the majority opinion simply overrules Baker vs. Hickman County and Oehmig vs. City of Chattanooga.

TOMLINSON, J.

APPENDIX 8

STATE OF TENNESSEE, EX REL. V. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, ET AL.	DAVIDSON EQUITY

MEMO ON SECOND PETITION TO REHEAR

The Court has permitted a second petition to rehear to be filed.

This petition has received the full consideration of the Court. For the most part the petition covers matters already discussed in our former opinions.

As to the Federal question of the effect of our opinion contravening the 14th Amendment to the Constitution of the United States, we say that under our view of the case, the defendants are mere licensees and have no property rights in the rights of way.

It results that we find the petition without merit and it is accordingly overruled.

PREWITT, J.

For the reasons heretofore stated
Justices Burnett and Swepston concur.
Chief Justice Neil and Justice
Tomlinson dissent.

APPENDIX 9

CHAPTER NO. 170

Senate Bill No. 575
(By Jennings, Dyer)

An act providing for the relocation of utility facilities, when necessitated by Federal-aid highway projects, and the payment of the cost of such relocation by the state as a highway construction cost with reimbursement from Federal funds as provided in the Federal-Aid Highway Act of 1956; prescribing the powers and duties of the Commissioner of Highways and Public Works in regard thereto; and providing the method of reimbursing said utilities.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That whenever the construction of any project on the Interstate System of Highways, as defined and provided for by the Federal-Aid Highway Act of 1956, being Public Law 627, Eighty-fourth Congress, Second Session, including extensions thereof in urban areas, with State and Federal funds, shall necessitate the relocation of any utility facilities, as referred to in Section 111 of said Federal-Aid Highway Act of 1956, whether heretofore or hereafter constructed, the utility owning or operating such facility shall relocate the same upon order of the Commissioner of Highways and Public Works; *provided, however, that the cost of relocation shall not be deemed a right of way cost to be paid in whole or in part by any county or municipality, but is hereby declared to be a part of the cost of the construction of such project and the same shall be paid by the*

State, after the utility has furnished it with all papers, records, or supporting documents required by the Federal Government, out of such funds then or thereafter available for such highway construction, in accordance with the provision of Section 111 *of said Federal-Aid Highway Act of* 1956. (Emphasis supplied)

Provided, however, the State may by force account or contract relocate such facilities, or, as an alternative, shall have the right to require the utility owning or operating such facility to relocate the same in which event the State shall reimburse such utility for the cost or relocation in accordance with Sub-section (c), Section 111, of said Federal-Aid Highway Act of 1956; provided further, however, that in the event the utility and the State are unable to agree as to the cost of such relocation, the question may be arbitrated as hereinafter set out.

Section 2. Be it further enacted, That whenever the construction of any project on the Federal-aid primary or secondary system of highways, as defined and provided for by the Federal-Aid Highway Act of 1956, being Public Law 627, Eighty-fourth Congress, Second Session, including extensions thereof into urban areas, with State and Federal funds, shall necessitate the relocation of any utility facility, as referred to in Section 111 of said Federal-Aid Highway Act of 1956, located upon a publicly owned right of way and not upon a right of way owned by such utility, whether heretofore or hereafter constructed, the utility owning or operating such facility shall relocate the same upon order of the Commissioner of Highways and Public Works at its own expense and the utility may after such relocation make a claim to the Commissioner of Highways and Public Works for

reimbursement. The Commissioner is authorized and empowered to determine whether such costs, if paid by the utility, will result in undue hardship on the utility to the extent that its financial structure shall be substantially impaired or its rates subjected to an increase as a result of said relocation cost. If he finds such an impairment in the financial structure of the utility, the State shall reimburse the utility from such State and Federal-aid funds in such amount as the Commissioner may deem appropriate but not more than provided for by Sub-section (c), Section 111, of said Federal-Aid Highway Act of 1956.

Section 3. Be it further enacted, That in the event any utility and the Commissioner of Highways and Public Works are unable to agree on the cost of relocating facilities as provided for in Section 1 of this Act, or in the event the Commissioner of Highways and Public Works and any utility are unable to agree upon whether or not the claim of a utility as provided by Section 2 of this Act shall be paid, such utility and the State, through the Commissioner of Highways and Public Works, shall submit the question in controversy to arbitration under the provisions of Section 23-502 et seq., Tennessee Code Annotated, and the award of the arbitrators shall be final and binding upon the parties. This section shall not apply to relocation made by force account or under a contract by the Department of Highways and Public Works.

Section 4. Be it further enacted, That all laws and parts of laws in conflict with this Act be and the same are hereby repealed.

Section 5. Be it further enacted, That this Act take effect from and after its passage, the public welfare requiring it.

Passed: March 7, 1957.

Jared Maddux,
Speaker of the Senate
James L. Bomar,
Speaker of the House of Representatives

Approved: March 14, 1957.

Frank G. Clement,
Governor

APPENDIX 10

Tit. 23. Section 123. Relocation of utility facilities (Sec. 111 of 1956 Act. as amended according to footnote.)

(a) When a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on the Federal-aid primary or secondary systems or on the Interstate System, including extensions thereof within urban areas, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project. Federal funds shall not be used to reimburse the State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State. Such reimbursement shall be made only after evidence satisfactory to the Secretary shall have been presented to him substantiating the fact that the State has paid such cost from its own funds with respect to Federal-aid highway projects for which Federal funds are obligated subsequent to April 16, 1958, for work, including relocation of utility facilities.

(b) The term "utility", for the purposes of this section, shall include publicly, privately, and cooperatively owned utilities.

(c) The term "cost of relocation", for the purposes of this section, shall include the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility. Added Pub. L. 85-767, § 1, Aug. 27, 1958, 72 Stat. 900.

Footnote: Amended by adding last sentence of sub-section (a) in 1958.

APPENDIX 11

Tennessee Constitution, Article II, Sec. 31.

State; loan of credit; ownership of bank; stockholder

The credit of this State shall not be hereafter loaned or given to or in aid of any person, association, company, corporation, or municipality; nor shall the State become the owner, in whole or in part, of any bank, or a stockholder with others in any association, company, corporation, or municipality.

APPENDIX 12

Judgment of Peers; Compliance with Law of Land

Sec. 8. That no man shall be taken or imprisoned, or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers or the law of the land.

Sec. 21. That no man's particular services shall be demanded, or property taken or applied to public use without the consent of his representatives, or without just compensation being made therefor.

APPENDIX 13

MINNESOTA SUPREME COURT OPINION
HENNEPIN COUNTY

37568—No. 101 Matson, J.
Minneapolis Gas Company Respondent

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vs.

1. P. Zimmerman, Commissioner of Highways for State of Minnesota, Appellant.

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Gustav C. Axelrod, St. Paul (Minnesota State Automobile Association)
Charles A. Sawyer, City Attorney (City of Minneapolis)
Harry Weinberg, City Attorney (City of Duluth)
Marshall Hurley, Corporation Counsel (City of St. Paul)

SYLLABUS

1. In the absence of qualifying or restrictive language, the provisions of Minn. Const. art. 16, Secs. 2 and 6, are not to be construed as expressing an intent to limit the expenditure of funds thereunder to only one, or less than all, of the purposes for which highways exist in our society of today.

2. Since 1895 Minnesota has been definitely committed to the view that the use of rights-of-way by utilities for locating their facilities is one of the proper and primary purposes for which highways are designed even though their principal use is for travel and the transportation of persons and property.

3. In view of the fact that the transmission of utility services is one of the general and primary purposes for which highways are designed, it would be unrealistic to construe the broad language of Minn. Const. art. 16, Secs. 2 and 6, so narrowly as to prohibit the legislature from authorizing the use of highway funds for the nonbetter-

ment location of utility services as a proper cost of highway construction, reconstruction, improvement, and maintenance.

4. An act of the legislature is presumed to be constitutional and it will not be declared unconstitutional unless its invalidity appears clearly or unless there is a showing that beyond a reasonable doubt it violates some constitutional provision.

5. What is a public purpose that will justify the expenditure of public money is not capable of a precise definition, but the courts generally construe it to mean such an activity as will serve as a benefit to the community as a body and which, at the same time, is directly related to the functions of government.

6. The mere fact that some private interest may derive an incidental benefit from the activity does not deprive the activity of its public nature if its primary purpose is public.

7. Where it becomes reasonably necessary to relocate utility facilities upon a highway in order to improve the highway for public travel (and especially so, as to a highway designed to facilitate interstate travel and commerce and to further the common defense) an expenditure of funds to effect such relocation is properly a governmental function exercised for a public purpose of primary benefit to the entire community.

8. Although gratuities and benevolences of public moneys in aid of private undertakings are prohibited, Minn. Const. art. 9, Secs. 1 and 10, does not prohibit the

legislature from by prospective action (that is by an enactment prior to the ordering of a relocation of utility facilities or prior to the commencement of a great public work requiring such relocation), fixing the conditions of performance and making provisions for the future recognition of claims for damages founded on equity and justice, although such claims would otherwise be damnum absque injuria and unenforceable against the state.

9. Minn. Const. art. 9, Sec. 5, expressly excepts highway construction work under art. 18 from the provision prohibiting the state from contracting debts for, or engaging in, works of internal improvement.

10. The Reimbursement Act (Ex. Sess. L. 1957, c. 4) is not special legislation in contravention of Minn. Const. art. 4, Sec. 33.

Affirmed.

OPINION

MATSON, Justice, (Hon. Rolf Fosseen, District Court Trial Judge.)

Defendant appeals from a summary judgment granted to plaintiff upon the pleadings and stipulated facts.

This action was initiated by plaintiff's petition asking for declaratory relief adjudging Ex. Sess. L. 1957, c. 4 (Otherwise designated as M. S. A. 161.131 to 161.135.) (Hereinafter referred to as the Reimbursement Act) to be constitutional, and further praying for a peremptory writ of mandamus to compel the defendant, as commissioner of highways for the State of Minnesota (a) to

ascertain, as required by said act, the cost of relocating plaintiff's utility facilities, (b) to certify the cost thereof to the Bureau of Public Roads, and (c) to pay the same out of state highway funds in a sum which shall not exceed the amount on which the Federal government bases its reimbursement to the state for such relocation.

This case arises out of Minnesota's participation in the Federal road building program authorized by the Federal-Aid Highway Act. The crux of the litigation involves the validity of an act passed by the 1957 legislature which purports to authorize the state to pay from highway funds the cost of relocating utility facilities on Federal-Aid roads subject, however, to a 90 per cent reimbursement from Federal funds.

Plaintiff, a "utility" as defined in the Reimbursement Act, is a private corporation engaged primarily in purchasing, distributing, and selling natural gas in Minneapolis and surrounding communities. The Reimbursement Act (Ex. Sess. L. 1957, c. 4) was enacted by the Minnesota legislature to implement a provision of the Federal-Aid Highway Act of 1956, 70 Stat. 383, 23 USCA, Sec. 162, which provides for the payment to utilities of the nonbetterment cost (Nonbetterment cost is the net cost after deducting any increase in the value of the new facility and any salvage value derived from the old facility. See Ex. Sess. L. 1957, c. 4, sec. 2.) of relocating their facilities when such relocation is made necessary in furtherance of the Federal road construction program.

The Federal-Aid Highway Act (70 Stat. 374, 23 USCA, Sec. 151, et seq.) enacted by Congress in 1956 creates a network of 41,000 miles of interstate and defense high-

ways to be constructed by the several states, but paid for by Federal funds in the minimum amount of 90 per cent of the total construction cost. As a part of the construction cost, the Federal act specifically provides that a utility—whether publicly, privately, or cooperatively owned—which, in the course of such highway construction, is required to change the location of any of its facilities on the right-of-way shall be paid the nonbetterment cost of such relocation out of Federal funds *provided the state initially makes the payment to the utility in accord with* 70 *Stat.* 383, 23 *USCA, Sec.* 162 (*a*) *of the Federal act which reads*:

> "(a) Subject to the conditions contained in this section, *whenever a State shall pay for the cost of*

Footnote 1. (70 Stat. 383, 23 USCA, Sec. 162 (b): see Ex. Sess. L. 1957, c. 4, Sec. 2, subd. 3 which provides:

> "Utility means all publicly, privately, and cooperatively owned systems for supplying power, light, gas, telegraph, telephone, water, pipeline or sewer service *if such systems be authorized by law to use public highways for the location of its facilities.*" (Emphasis supplied)

Footnote 2. (The nonbetterment cost referred to herein is the cost as defined by 70 Stat. 383, 23 USCA, Sec. 162 (c) as follows:

> "(c) For the purposes of this section, the term 'cost of relocation' shall include the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility."

relocation of utility facilities necessitated by the construction of a project on the Federal-aid primary or secondary systems or on the interstate System, including extensions thereof within urban areas, *Federal funds may be used to reimburse the State for such cost in the same proportion* as Federal funds are expended on the project: *Provided, That Federal funds shall not be apportioned to the States under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State.*" (Emphasis supplied)

Many states, in order to qualify for Federal reimbursement for relocation costs upon Federal-aid highways within their borders, have found it necessary to enact enabling legislation to meet the conditions and terms prescribed by Congress. This has been true of Minnesota. Our state legislature, in recognition of this need, passed the Reimbursement Act (Ex. Sess. L. 1957, c. 4) to implement the above-quoted provision of the Federal-Aid Highway Act of 1956. In so far as here immediately pertinent, the Reimbursement Act provides:

"Sec. 5. Whenever the commissioner of highways shall determine that the relocation of any utility facility is necessitated by the construction of a project on the routes of *federally-aided state trunk highways,* including urban extensions thereof, which routes are included within the National System of Interstate Highways, the owner or operator of such utility facility shall relocate the same in accordance with the order of the commissioner. After the completion of such relocation the cost thereof shall be ascertained and paid by the state out of trunk highway funds; provided, however, *the amount to be paid by the state for such reimbursement shall not*

exceed the amount on which the federal government bases its reimbursement for said interstate system.

"Sec. 6. There is hereby appropriated out of the trunk highway fund a sum of money sufficient to carry out the provisions of this act." (Emphasis supplied)

Prior to the enactment of Ex. Sess. L. 1957, c. 4, plaintiff, as a public utility, occupied with its gas mains the rights-of-way of Trunk Highways Nos. 394 and 65 (now designated as Interstate Highway No. 394) under a written permit issued by the Commissioner of highways for the state. Under the terms of the permit plaintiff agreed that, in the event the state deemed it necessary to make any improvements or changes on all or any part of the right-of-way occupied by its gas mains, it would, *without any cost whatsoever to the State of Minnesota,* alter, change, vacate, or remove from the trunk highway right-of-way said gas mains so as to conform to such road changes or improvements. Absent the 1957 act, clearly the state would be under no legal obligation to reimburse the plaintiff, or any other similarly situated utility, for such relocation costs.

In May 1957, defendant, as state commissioner of highways, notified plaintiff that impending Federal-aid highway construction would require relocation of its gas mains on what had been Trunk Highway No. 65. Pursuant to regulations issued by the U. S. Public Roads Administration, (See, General Administration Memorandum No. 300 of U. S. Public Roads Administration (Federal Works Agency) dated May 1, 1946.) and subject to the terms of the Federal act, as implemented by the Reimbursement Act, defendant, acting on behalf of the State of Minnesota, on July 2, 1957, entered into a written

agreement with the plaintiff whereby the latter agreed to relocate its gas mains at an estimated cost of $17,068.10 and the state agreed to determine the allowable non-betterment cost thereof and to reimburse plaintiff therefor *but only in a sum which in no event exceeds the amount on which the Federal government bases its reimbursement* (90 *per cent*) *to the state of the cost of such relocation.* This agreement was approved by the division engineer of the U. S. Public Roads Administration, subject to the following condition:

> "There will be no Federal-aid participation in this agreement until the State can certify that payment by the State to the Minneapolis Gas Co. of utility relocation costs *provided therein does not violate the law of the State or a legal contract with the Gas Company* in existence at the time the project was approved for Federal participation. • • • this certificate must be supported by an Attorney General's opinion or court decision clearly defining the State's liability under Section 5, of Chapter 4, Minnesota Special Session Laws of 1957." (Emphasis supplied)

Plaintiff relocated its facilities as ordered by defendant and in January 1958, delivered to defendant an itemized statement of the nonbetterment cost of relocating its facilities in accordance with the general administrative memorandum of the Public Roads Administration and as provided in the agreement between the parties. Plaintiff requested defendant to determine the cost of relocation and to reimburse plaintiff. This defendant has refused to do. The parties have stipulated, in addition to the foregoing, that if plaintiff is entitled to reimbursement under Minnesota law all conditions precedent on plaintiff's part to its reimbursement have been per-

formed; that since January 10, 1958, there have been sufficient funds in the trunk highway fund to pay all obligations due and owing against the fund.

Pursuant to plaintiff's motion for summary judgment, the district court, upon the pleadings and upon stipulated facts, made its findings and concluded as a matter of law that the Reimbursement Act is in all respects constitutional and ordered judgment for the plaintiff. Defendant appeals from the summary judgment.

This appeal presents issues as to whether the Reimbursement Act:

1. Violates Minn. Const. art. 16, Secs. 2 and 6, by diverting funds for a nonhighway purpose?

2. Violates Minn. Const. art. 9, Secs. 1 and 10, by authorizing the expenditure of funds for a private purpose?

3. Violates Minn. Const. art. 9, Sec. 5, by contracting debts for works of internal improvement?

4. Violates Minn. Const. art. 4, Sec. 33, by granting to a corporation a special or exclusive privilege, immunity, or franchise?

5. Violates U. S. Const. art. 1, Sec. 10, and Minn. Const. art. 1, Sec. 11, by impairing the obligation of a contract?

NO DIVERSION OF HIGHWAY FUNDS FOR NONHIGHWAY PURPOSES

1. Minn. Const. art. 16, Sec. 6, adopted in 1956, creates a trunk highway fund which shall be used solely for

the purposes specified in Sec. 2 of the same article which declares:

> "There is hereby created a trunk highway system which shall be established, located, constructed, reconstructed, improved and maintained as public highways by the state.***"

The two foregoing sections taken together constitute the sole constitutional limitation on the use of trunk highway funds. The issue is, then, whether the nonbetterment cost of relocating a utility facility, necessitated by the construction of an interstate and defense highway, is within the highway purposes enumerated in art. 16, Sec. 2. In resolving that issue, it is of course immaterial whether the utility has theretofore had an uncompensable duty at common law to relocate its facilities. If it once appears that an expenditure is made for a proper highway purpose, it is of no consequence that such an expenditure has never been made in the past.

Significantly, art. 16, Secs. 2 and 6, are of broad import and do not of themselves define the functional use of a public highway or what constitutes proper construction, reconstruction, improvement, and highway maintenance costs. In the absence of qualifying or restrictive language, these constitutional provisions are not to be construed as expressing an intent to limit the expenditure of funds thereunder to only one, or less than all, of the purposes for which highways exist in our society of today. The concept of the functional uses or purposes of a highway has constantly expanded with the advancement of civilization until today a highway no longer exists for the limited, though principal, purpose of vehicular travel or transportation of persons and property

over its surface. Sixty-three years ago,—in passing on the variety and extent of uses for which a highway easement had been acquired, and in specifically holding that the easement embraced the erection of telephone lines' (As early as 1860 the legislature gave telegraph companies the right to erect poles on the public roads and highways of the state. L. 1860, c. 12, Sec. 1. Subsequently, the right of occupancy was given to other utilities. See, M. S. A. 222.37.) —this court, in Cate v. Northwestern Tel. Ex. Co. 60 Minn. 539, 543, 63 N. W. 111, 112, speaking through the clear thinking and farseeing Mr. Justice Mitchell, said:

"* * * Hence it has become settled law that the easement is not limited to the particular methods of use in vogue when the easement was acquired, but includes all new and improved methods, the utility and general convenience of which may afterwards be discovered and developed in aid of the general purpose for which highways are designed. * * *

Another proposition, which we believe to be sound, is that *the public easement in a highway is not limited to travel or transportation of persons or property in movable vehicles.* This is, doubtless, the principal and most necessary use of highways, and in a less advanced state of society was the only known use, as the etymology of the word 'way' indicates. * * * *But it is now universally conceded that urban highways may be used for constructing sewers and laying pipes for the transmission of gas, water, and the like for public use.* * * * *The uses referred to of urban streets are not in aid of travel, but are themselves independent and primary uses, although all within the general purpose for which highways are designed.*

Neither can a distinction between urban and rural ways be sustained on the ground that such uses were contemplated when the public easement was acquired in the former but not when the easement was acquired in the latter * * *.

"* * * In our judgment, public highways, *whether urban or rural,* are designed as avenues of communication; and, if the original conception of a highway was limited to travel and transportation of property in movable vehicles, it was because these were the only modes of communication then known; that as civilization advances, and new and improved methods of communication and transportation are developed, these are all in aid of and within the general purpose for which highways are designed." (Emphasis supplied)

2. Clearly since the Cater decision in 1895, Minnesota has been definitely committed to the view that the use of rights-of-way by utilities for locating their facilities is one of the proper and primary purposes for which highways are designed even though their principal use is for travel and the transportation of persons and property. Furthermore, the import of that decision is a clear recognition that the use of highway rights-of-way for the transmission of public intelligence and public utility services confers important and direct benefits upon the public and that such use is not solely for the benefit and convenience of the utilities. The soundness of the view that the placing of utility facilities upon a right-of-way is one of the proper uses of a highway benefiting the public is emphasized by the fact that convenience and economy result therefrom to utility users, who are usually located near highways, and by the further fact that, it is in the

interest of the public welfare—in the view of our ever-increasing population—to make full and efficient use of the land surface occupied by public roads.

3 - 4. In view of the fact that the transmission of utility services is one of the general and primary purposes for which highways are designed, it would be unrealistic to construe the broad language of Minn. Const. art. 16 Secs. 2 and 6, so narrowly as to prohibit the legislature from authorizing the use of highway funds for the nonbetterment location of utility services as a proper cost of highway construction, reconstruction, improvement, and maintenance. It would be unreasonable to hold that the proceeds of the highway fund may not be expended for whatever is reasonably necessary to the complete accomplishment of all the basic purposes for which a highway exists. (See, 40 C. J. S., Highways, Sec. 176h (2) (a).) If we were to conclude otherwise we would not only disregard the broad language of the constitution but also the principle that, since an act is presumed to be constitutional, it will not be declared unconstitutional unless its invalidity appears clearly or unless it is shown beyond a reasonable doubt that it violates some constitutional provision. The power of the court to declare a law unconstitutional is to be exercised only when absolutely necessary in the particular case and then with great caution. (Dimke v. Finke, 209 Minn. 29, 32, 295 N.W. 75, 78; State ex rel. Hilderbrandt v. Fitzgerald, 117 Minn. 192, 134 N.W. 728; Reed v. Bjornson, 191 Minn. 254, 253 N.W. 102; Muller v. Theo. Hamm Brewing Co. 197 Minn. 608, 268, N.W. 204; State v. Fairmont Creamery Co. 162 Minn. 146, 202 N.W. 714, 42 A. L. R. 548; First Nat. Bank of Boston v. Maine Turnpike Authority, 153 Me. 131, —

136 A. (2d) 699, 721; 17 Dunnell, Dig. (3 ed.) Secs. 8929, 8930, and 8931.)

It is nothing new for the state not only to recognize that public service installations are an integral part of the highway (M. S. A. 222.37) but also—as it is admitted—to find it proper, as it has done on various occasions, to reimburse municipalities out of the highway fund for the cost of relocating their utility facilities. In fact the state has heretofore also paid from the highway fund the cost of relocating railroad crossings to the extent that such relocation has not benefited the railroads. Secs. 161.03, Subd. 1, and 219.40. The right of railroads to reimbursement out of the highway fund for the non-betterment cost of relocating railroad crossings has been recognized despite the fact that railroads do not have the same right to occupy highways as do other utilities. (Compare Sec. 222.37, Secs. 161.03, subd. 1, 222.26 and 219.40.) The principal which justifies the reimbursement of railroads for relocation costs is equally applicable to other utilities which occupy our highways. Although these prior acts of reimbursement do not establish their validity under the constitution, they are, however, a persuasive recognition that nonbetterment relocation costs are a normal and necessary part of highway construction and reconstruction costs. (Significantly, many state legislatures by their enactments have expressly found that relocation expenses are an integral part of the cost of highway construction. See, Alabama Code 1940 (1955 Supp.) Tit. 23, Sec. 124 (16) (e); Florida Stat. 1957, Sec. 340.07 (5); Illinois Smith-Hurd Stat. Anno. (1957 Supp.), c. 121, Sec. 314a34; Indiana Burns Stat. Anno. (1957 Supp.) Sec. 36-3206; Kansas General Stat. (1957 Supp.), Sec. 68-2005; Kentucky Rev. Stat., Sec. 177.430 (5); Louisiana Rev. Stat.

(1957 Supp.), Tit. 48, Sec. 1256E; Maryland Anno. Code (1957 Supp.), Art. 89B, Sec. 126E; Michigan Stat. Anno. (1957 Supp.), Sec. 9.1095. (5); New Jersey Stat. Anno. (1957 Supp.), Tit. 27, Sec. 12B-6; North Carolina General Stat., Sec. 136-89.18; Ohio Page's Rev. Code, Sec. 5537.05; Rhode Island General Laws 1956, Sec. 24-12-9 (q); Texas Vernon's Civil Stat. Anno. (1957 Supp.), Art. 6674v, Sec. 6; Vermont Laws 1955, No. 270, Sec. 4; Virginia Code 1950, Sec. 33-255.6.)

Although we have not heretofore had occasion to consider the relocation cost issue, our conclusion that article 16 is to be given a broad, and not a strict, construction which justifies the payment of such costs out of the highway fund is justified by a number of prior decisions in which we have approved the payment of expenses which were reasonably related to the construction and maintenance of highways. We have held a legislative act valid which appropriated money from the highway fund to defray the costs of issuing motor vehicle licenses and of collecting the license fees; (State ex rel. Holm v. King, 184 Minn. 250,238 N. W. 334.) further that an appropriation of such money to the state auditor, treasurer, civil service commission, and the commissioner of administration, to defray expenses of services reasonably attributable to highway matters is valid; (Cory v. King, 214 Minn. 535, 8 N. W. (2d) 614.) and that a similar appropriation to reimburse the general fund for services rendered the trunk highway fund by the commissioner of taxation is likewise valid. (Cory v. King, 227 Minn. 551, 35 N. W. (2d) 807. For other pertinent cases dealing with article 16 of our state constitution, see State ex rel. Chase v. Babcock, 175, Minn. 103, 220 N. W. 408; Regan v. Babcock, 196 Minn. 243, 264 N. W. 803; State, by Peterson,

v. Werder, 200 Minn. 148, 273 N. W. 714. State ex rel. County of Ramsey v. Babcock, 186 Minn. 132, 242 N. W. 474, is not in point since that case turned on the construction of a section of the then article 16 which does not appear in the present article 16.)

RELOCATION COSTS ARE VALID EXPENDITURES FOR A PUBLIC PURPOSE

5-6. Does the Reimbursement Act violate Minn. Const. art. 9, Secs. 1 and 10, on the theory that it authorizes the expenditure of public funds for a private—as distinguished from a public—purpose? Minn. Const. art. 9, in so far as here pertinent, provides:

> "Section 1. • • • Taxes shall be • • • levied and collected for public purposes, • • •
>
> • • • • •
>
> "Sec. 10. The credit of the State shall never be given or loaned in aid of any individual, association or corporation, • • •"

Under the foregoing closely interrelated sections are Article 9, (See, Minnesota Sugar Co. v. Iverson, 91 Minn. 30, 35, 97 N. W. 454, 455.) public funds derived from taxation may be spent only for a public purpose (Sec. 1) and this limitation is safeguarded against indirect erosion by the specific prohibition that the credit of the state shall never be given or loaned in aid of any individual, association, or corporation (Sec. 10). In short, public funds shall be used solely for public purposes and shall never be used, or incumbered by pledging the state's credit, in the furtherance of any private purpose or in

the aid of any private individual or entity. In Visina v. Freeman, 252 Minn. —, ——, 89 N. W. (2d) 635, 643, we said:

> "* * * What is a 'public purpose' that will justify the expenditure of public money is not capable of a precise definition, but the courts generally construe it to mean such an activity as will serve as a benefit to the community as a body and which, at the same time, is directly related to the functions of government.
>
> "The mere fact that some private interest may derive an incidental benefit from the activity does not deprive the activity of its public nature if its primary purpose is public."

7. In the light of the above principles, is the authorization of payment out of the highway fund to reimburse a utility (whether it be private, corporate, or municipal) for the nonbetterment cost of relocating its facilities upon a Federal highway an expenditure for a public purpose which is of primary benefit to the community as a body and which is related to the functions of government? Historically, the establishment and maintenance of highways has been considered a governmental function. Furthermore, Minn. Const. art. 16, in specifically authorizing the construction and maintenance of public highways by the state, unquestionably establishes road building for the public as a governmental function of benefit to the entire community. We have already pointed out that the use of rights-of-way by utilities for locating their facilities is one of the primary purposes for which highways are designed, even though their principal use is for public travel and transportation of persons and

property. It follows that where it becomes reasonably necessary to relocate such utility facilities in order to improve the highway for public travel (and especially so, as to a highway designed to facilitate interstate travel and commerce and to further the common defense) an expenditure of funds to effect such relocation is properly a governmental function exercised for a public purpose of primary benefit to the entire community. It is primarily for a public purpose not only because the relocation is made necessary in order to expedite public travel and transportation, but also for other substantial reasons. The realities of the situation are that the people of Minnesota would suffer economically if the state failed to take advantage of Federal aid made available to the privately and municipally owned utilities of this state under the Federal-Aid Highway Act of 1956, in 70 Stat. 383, 23 USCA, Sec. 162. The Federal-Aid program is to be financed out of Federal funds, presumably resulting from Federal taxes contributed in part by the people of this state. If the utilities located in this state must undertake relocation of their facilities without a right to reimbursement, their costs will be substantially increased and this in turn will be reflected in higher utility rates in Minnesota communities. Furthermore, to the extent that other states effectuate Federal aid to their utilities and Minnesota does not, the people of Minnesota will be paying Federal taxes which will benefit the people of the other states but which will not benefit the people of Minnesota. The resulting economic benefit to the people of Minnesota from an authorization of these expenditures is a benefit to the community as a whole.

That the Reimbursement Act, in authorizing the payment of nonbetterment relocation costs from highway

moneys and thus qualifying Minnesota for a 90-per cent reimbursement from Federal funds, furthers a public purpose of benefit to the entire state was graphically illustrated in Department of Highways v. Pennsylvania P. U. Comm. 185 Pa. Super. 1, —, 136 A. (2d) 473, 477, when the Pennsylvania court said:

> "* * * Thus, if state 'A' receives from the federal government 90% of the cost of other utility relocations on inter-state highways because the policy of that state is to bear this cost, while state 'B' receives nothing from the federal government for utility relocations because its policy is not to bear this cost, the citizens of state 'B' will pay on their utility bills for utility relocations in their state, and will also pay in their federal gasoline tax for a part of the cost of relocating utilities in state 'A'."

Does the Reimbursement Act, however, confer upon plaintiff utility benefits which nullify our conclusion that payments under the act are primarily for a public purpose? At the outset, it is to be borne in mind that the act provides (Ex. Sess. L. 1957, c. 4, Sec. 2, subd. 4):

> "'Cost of relocation' means the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility."

By virtue of the above definition a utility's right to reimbursement is limited strictly to nonbetterment costs. If the relocation benefits the utility by increasing the value of its facilities or produces any salvage values, such increase and salvage values must be deducted from the total relocation cost in order to establish the reim-

bursable costs. In this respect the utility derives no benefit—not even an incidental one—and is protected only from a net loss. The reimbursement merely restores plaintiff utility to the same position it was prior to the relocation of its facilities.

NO GRATUITY CONFERRED IN VIOLATION OF CONSTRUCTION

8. It is argued, however, that since plaintiff utility, at common law and under the terms of the occupancy permits issued to it by the state, was entitled to no reimbursement and was solely responsible for all costs of relocating its facilities on the highway, the Reimbursement Act, in authorizing payment of such relocation costs from the highway fund, confers upon the plaintiff a gratuity of public moneys in violation of Minn. Const. art. 9, Secs. 1 and 10. This argument ignores the well established principle—followed by other jurisdictions with identical or similar constitutional provisions (Lehigh Valley R. R. Co. v. Canal Board, 204 N. Y. 471, 97 N. E. 964; Oswego & Syracuse R. R. Co. v. State, 226 N. Y. 351, 124 N. E. 8; Department of Highways v. Pennsylvania P. U. Comm. 185 Pa. Super, 1, 136 A. (2d) 473.)—that, although gratuities and benevolences of public moneys in aid of private undertakings are prohibited, the state constitution does not prohibit the legislature from by prospective action (that is by an enactment prior to the ordering of a relocatio of utility facilities or prior to the commencement of a great public work requiring such relocation), fixing the conditions of performance and making provisions for the future recognition of claims for damages founded on equity and justice, although such claims would otherwise be damnum absque injuria

and unenforceable against the state. (We have not overlooked the case of Bybee v. City of Minneapolis, 208 Minn. 55, 292 N. W. 617, Wherein it was held the city was unauthorized to sell bonds to alter a railroad bridge where common-law duty required the railroad to alter the bridge at its own expense. The Bybee case is distinguishable by the fact that no act of the state legislature had abrogated such common-law duty.) Advance provisions for the recognition of anticipated relocation cost claims, founded on equity and justice, is ex gratia only in the sense that the constitution *does not require* the state to pay such costs. (Emphasis supplied.)

In Oswego & Syracuse R. R. Co. v. State, 226 N. Y. 351, 124 N. E. 8, we have a case in which *a railroad had built its bridge pursuant to a permit issued by the state wherein it was provided that the railroad could be required to remove the bridge at its own expense.* (See footnote No. 17, *infra,* in re Lehigh Valley R. R. Co. v. Canal Board, 204. N. Y. 471, 97 N. E. 964, involving obligation at common law.) (Emphasis supplied.) Mr. Justice Cardozo, speaking for a unanimous court, rejected the claim of the attorney general that reimbursement pursuant to the statute would violate a constitutional prohibition against gifts. In part the court said (226 N. Y. 351, 356, 124 N. E. 8, 10):

> "At the threshold stands a question of constitutional power. 'Neither the credit nor the money of the State shall be given or loaned to or in aid of any association, corporation or private undertaking.' (Constitution, art. 8, sec. 9). The state finds in this command a barrier to reimbursement. In the case of the Lehigh Valley Railroad Company, the same barrier was interposed. (Lehigh Valley R. R. Co. v.

Canal Board, supra). The court found it unreal. We did not deny the power of the legislature in the improvement of navigation to tear down bridges and other obstructions without requital for resulting loss (Citing cases.). We held, however, that the legislature did not violate the Constitution in refusing to exert the full measure of its might. Mere gifts and benevolences in aid of private undertakings, the Constitution does prohibit (Citing cases.). It does not prohibit the recognition of claims which have their roots in equity and justice (Citing cases.). This is not a case where the legislature, after building the canal, has voted compensation retrospectively for the expenses of a private undertaking. We say that to exclude a problem, and not to suggest its answer. This is a case where the legislature, by action looking to the future, has defined the terms of equity and justice upon which it will go into an enterprise. In fixing these conditions, the legislature has a wide discretion (Citing cases.)." (In the earlier case of Lehigh Valley R. R. Co. v. Canal Board, 204 N. Y. 471, 97 N. E. 964, the railroad was subject to a common-law obligation to relocate its bridges at its own expense, but this common-law obligation was abrogated by act of the New York legislature. Our own decision of Bybee v. City of Minneapolis, 208 Minn. 55, 292 N. W. 617, involved a common-law obligation which had not been rescinded or abrogated by a legislative enactment. See, footnote No. 15, *supra*. (Emphasis supplied.) Cf. State ex rel. City of St. Paul v. Minnesota T. Ry. Co. 80 Minn. 108, 83 N. W. 32.)

In commenting on the legislature's power to define the conditions upon which the state would enter upon a vast public construction program, the court said (226 N. Y. 351, 357, 124 N. E. 8, 10):

"* * * The state was about to execute a great pub-

lic work. It saw that in the doing of that work there would be destruction of private property. Much of the damage would be *damnum absque injuria.* (Emphasis supplied.) None the less it would be damage. The result would be inequality in the distribution of public burdens. Some would pay more dearly than others in proportion to benefits received. This inequality, the legislature, fixing in advance the conditions of the undertaking, had the power to correct. It might refuse to launch an enterprise at the price of hardship and oppression. There was power to destroy, and leave the loss where it might fall. There was also power to pay for the destruction, and thereby re-establish some uniformity of proportion between benefits and burdens. The question was for the legislature whether the equity of compensation was strong enough to merit recognition. We cannot hold it to be illusory."

NO WORKS OF INTERNAL IMPROVEMENT INVOLVED

9. The Reimbursement Act (Ex. Sess. L. 1957, c. 4) does not violate Minn. Const. art. 9, Sec. 5, which reads:

> "The state shall never contract any debts for works of internal improvements, or be a party in carrying on such works, except as authorized by * * * Article 16 of this Constitution * * *" (Boldface supplied.)

Aside from the obvious fact that the construction and maintenance of public highways under article 16 is performed by the state in its sovereign capacity and in the discharge of its governmental functions, (See Visina v. Freeman, 252 Minn.—— 89 N.W. (2d) 635: Naftalin v. King, 252 Minn.——90 N.W. (2d) 185: Erickson v. King, 218 Minn. 98, 15 N.W. (2d) 201: Lipinski v. Gould, 173

Minn. 559, 218 N.W. 123, 730: State ex rel. Smith v. Van Reed, 125 Minn. 194, 145 N.W. 967, 17 Dunnell, Dig. (3 ed) Sec. 8830.) highway construction work under article 16 is clearly and expressly excepted from the prohibition against engaging in works of public improvement. This disposes of the internal improvement issue.

NOT A SPECIAL LAW CONTRARY TO MINN. CONST. ART. 4, SECTION 33

10. Does the Reimbursement Act, however, contravene that part of Minn. Const. art. 4, Sec. 33, which reads:

> "* * * The legislature shall pass no local or special law * * * granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever, or authorizing public taxation for a private purpose."

Defendant asserts that the Reimbursement Act is invalid as a special law because it selects for special benefit a part of a larger class and the resulting classification is neither related to the subject of the legislation nor necessary to accomplish its purpose. Basic to a consideration of this contention is the principle that this court will not interfere with the legislature's classification unless it is so manifestly arbitrary as to evince a purpose of evading the constitution. (See Visina v. Freeman, 252 Minn. ——89 N.W. (2d) 635: Town of Bridgie v. County of Koochiching, 227 Minn. 320, 35 N.W. (2d) 537: State ex rel. Flaten v. Independent School District. 143 Minn. 433, 174 N.W. 414: State ex rel. Anderson v. Sullivan, 72 Minn. 126, 75 N.W. 8.) In Visina v. Freeman, 252 Minn. ——, ——, 89 N. W. (2d) 635, 651, we summarized the features which distinguish a general law from a special

law by saying:

"(1) A law is general when it is uniform in its operation even though it divides the subjects of its operation into classes and applies different rules to different classes. It need not operate alike upon all the inhabitants of the state, or all the cities, or all the villages in the state.

"(2) A law is general in the constitutional sense which applies to and operates uniformly upon all members of any class of persons, places, or things requiring legislation peculiar to itself in matters covered by the law.

"(3) A special law is one which relates and applies to particular members of a class, either particularized by the express terms of the act or separated by any method of selection from the whole class to which the law might, but for such limitation, be applicable.

"(4) The classification must be based upon 'substantial distinctions'—those which make one class really different from another. The distinction must be based 'upon some natural reason,—some reason suggested by necessity, by some difference in the situation and circumstances of the subjects placed in the different classes, suggesting the necessity of different legislation with respect to them.'

"(5) The classification must be germane to the purpose of the law; that is, there must be an evident connection between the distinctive features to be regulated and the regulations adopted.

"(6) To whatever class the law applies, it must apply to every member of that class; that is to say, it must treat all alike who are similarly situated;

'all who are brought within its influence, but in its classification it must bring within its influence all who are under the same conditions.'

"(7) One alone may constitute a class as well as many, but the fewer there are in a class the more closely will courts scrutinize an act to see if its classification constitutes an evasion of the constitution."

Applying the foregoing principles we hold that the Reimbursement Act does not violate Minn. Const. art. 4, Sec. 33. The Reimbursement Act authorizes the reimbursement of utilities for relocation of any utility facility necessitated by "a project on the routes of federally-aided state trunk highways, including urban extensions thereof, which routes are included within the national system of interstate highways." M. S. A. 161.134. Classification of these routes separately from other routes of the trunk highway system is based upon substantial distinctions which make this class of highways different from the others. The distinction is based on differences in the circumstances of interstate and defense highways as compared to other highways which suggest the necessity of different legislation with respect to them. The classification made in the Reimbursement Act is germane to the purpose of that law, which was to obtain for the citizens of Minnesota the full benefits accruing from Federal legislation and from being connected with a national system of interstate and defense highways.

NO IMPAIRMENT OF CONTRACT IN VIOLATION OF CONSTITUTION

It is finally contended that the Reimbursement Act

impairs the obligation of contracts within the prohibition of U. S. Const. art. I, Sec. 10 and Minn. Const. art. 1, Sec. 11. There is no merit in this contention for two reasons. In the first place, the preexisting contract established by plaintiff's applications to occupy the right-of-way and the occupancy permits issued by the state, created a contractual relation between two parties, the state and the plaintiff. No third parties have acquired any rights under or pursuant to the contract. It is elementary that where all parties to a contract mutually agree, by conduct or express words, to amend, rescind, or abrogate a contract, in whole or in part, such mutual action does not impair the obligation of contract within the prohibitory clauses of either the Federal or state constitutions. Initially the contract was entered into in behalf of the state by the commissioner of highways. Thereafter, the legislature—which is the highest representative authority through which the state can act (Naftalin v. King, 252 Minn. ——, ——, 90 N. W. (2d) 185, 191.) had the power by statutory enactment to amend the contract with the other contracting party's consent where no rights of third parties had in the meantime intervened. It is also well recognized that, if an administrative agency has entered into a contract as an agent of the state, the state (as the principal) may consent to release the other party from part or all of its obligations thereunder. (Worcester v. Street Ry. Co. 196 U. S. 539, 25 S. Ct. 327, 49 L. ed. 591; Western States Utilities Co. v. City of Waseca, 242 Minn. 302, 65 N. W. (2d) 255; State ex rel. Tri-State Tel & Tel. Co. v. Holm, 138 Minn. 281, 164 N. W. 989; State ex rel. City of St. Paul v. Mpls. St. P. & S. S. M. Ry. Co. 190 Minn. 162, 251 N. W. 275.)

In the second place, there is no impairment of the

obligation of contract since all contracts made by the state are entered into subject to the implied condition that they are ever subordinate to a reasonable and proper exercise of the state's inalienable police power. (Naftalin v. King, 252 Minn. ——, 90 N. W. (2d) 185; First Nat. Bank of Boston v. Maine Turnpike Authority, 153 Me. 131, 136 A. (2d) 699, 712; Department of Highways v. Pennsylvania P. U. Comm. 185 Pa. Super. 1, 136 A. (2d) 473; Southern Bell Tel. and Tel. Co. v. Commonwealth (Ky.) 266 S. W. (2d) 308, 311; 3 Dunnell, Dig. (3 ed.) Sec. 1603 at p. 460.) The relocation, construction, or reconstruction of highways clearly relates to the safety, security, and general welfare of the citizens of the state, and all steps taken in furtherance of these objects—inclusive of the relocation of utility facilities upon rights-of-way—are matters within the police power of the state. It is immaterial that a Federal-aid highway is involved. The judicial construction of a Federal-aid legislation has consistently been that the mere fact the United States contributes to or assists states in the building of roads does not take from or limit the states in the exercise of their police power or the right of control and regulate the use of their roads. (Southern Bell Tel. & Tel. Co. v. Commonwealth (Ky.). 266 S. W. (2d) 308, 311; South Carolina Highway Dept. v. Barnwell Bros. 303 U. S. 177, 58 S. Ct. 510, 82 L. ed. 734.

The Reimbursement Act (Ex. Sess. L. 1957, c. 4) violates neither the state nor the Federal constitutions and is valid. The summary judgment of the trial court is affirmed.

Affirmed.

APPENDIX 14

THE STATE OF TEXAS,
Appellant
VS.
CITY OF AUSTIN, ET AL,
Appellees

NO. 10,657

FROM DISTRICT COURT OF TRAVIS COUNTY, 53RD JUDICIAL DISTRICT, NOS. 110,489 AND 110,490, HONORABLE J. HARRIS GARDNER, JUDGE

These cases involving the same or similar questions, have been, on motion, consolidated.

Appellant the State of Texas filed two suits, No. 10,656 against the City of Dallas, Southwestern Bell Telephone Company, Dallas Power and Light Company and the Lone Star Gas Company, and No. 10,657 against the City of Austin, Southwestern Bell Telephone Company and the Southern Union Gas Company, seeking in each suit a declaratory judgment as to the rights and duties of the parties under Section 4-A of Chapter 300, page 724, Acts of the 55th Legislature, Regular Session, 1957, Article 6674w-4, V.A.C.S., and particularly the duty, if any, of the State to reimburse the defendants for their respective costs incurred in the removal, relocation and adjustment of their utility facilities occupying the streets, alleys, roads and public ways within the corporate limits of the City of Dallas and/or the City of Austin where such relocation or adjustment is necessitated by the improvement of an Interstate Highway.

These suits necessarily involve the constitutionality of Section 4-A of the Act.

The State contends that such section is unconstitutional, and the defendants contend that it is valid.

The Act, Chapter 300, p. 724, was passed to facilitate the construction, maintenance and operation of State highways. It contains a severability clause in Section 6. Section 4-A provides for reimbursement by the State to defendants of the cost of relocation of utility facilities necessitated by the improvement of an Interstate Highway, provided that such relocation is eligible for Federal participation.

As stated the only question presented for the Trial Court's determination was strictly the legal issue as to the constitutionality of Article 6674w-4 and the effect of such on the bill as a whole. Motions for summary judgment were filed by appellant and appellees supported by affidavits and each movant conceded that there were no genuine issues of fact in these cases.

The Trial Court granted the motions of appellees for summary judgment and denied appellant's motions.

The appeal is before this Court on nine points and are to the effect that the court erred in denying plaintiff's motion for summary judgment, in sustaining defendants' motion for summary judgment, in holding that Section 4-A is not invalid as a donation of public monies as prohibited by Section 51 of Article III of the State Constitution, and not invalid as a gift or loan of the credit of the

State in violation of Section 50, Article III of the Constitution, in holding Section 4-A is not invalid as a release of the obligations of corporations or individuals in violation of Section 55 of Article III of the Constitution, in holding that Section 4-A is not invalid as an appropriation for private or individual purposes as prohibited by Section 6 of Article XVI of the Constitution, in holding that Section 4-A does not delegate to the United States, its Congress, and agencies certain legislative authority which may properly be exercised only by the Legislature of the State of Texas, in holding that Section 4-A does not provide for disbursements to be made from the State Highway Fund in a manner and for a purpose prohibited by Section 7a of Article VIII of the Constitution, and in not confining the application of its judgment to the utility facilities situated within and upon the public streets, alleys, roads and other public ways within the corporate limits of the cities of Dallas and Austin and within the rights of way of the Interstate Highways, which were the only facilities placed in issue by the pleadings.

It is agreed that the defendants have installed their utility facilities within the rights of way of city streets, alleys and other public ways within the corporate limits of the City of Dallas and of the City of Austin and some of which installations are also within the rights of way of designated highways; that appellant has determined to be necessary the improvements and construction of such Interstate Highways, and such improvements and construction will necessitate the adjustment and relocation of such facilities; that due demand has been made on defendants (appellees) to adjust and relocate said facilities and they have refused to do so as plaintiff (ap-

pellant) refuses to enter into agreements to reimburse them for their costs and expenses so incurred.

Points one through six are grouped for argument, for the purpose of providing a presentation to this Court of the unconstitutionality of Article 6674w-4 in its application to the cities, and separately from the argument of its application to the utility companies.

Appellant asserts that the utility companies have a duty at their sole expense to relocate or remove their facilities which are presently situated in the rights of way in such a manner as to conform to the construction and improvement of all public streets and highways as they traverse the area within the corporate limits of the City of Austin, or City of Dallas as the case may be. The grant of authority by virtue of which defendant companies have located their facilities within the public rights of way is not absolute; to the contrary, it is qualified and conditional and are subordinate to the interests of the traveling public, and appellant cites City of San Antonio v. Bexar Metropolitan Water District, Tex. Civ. App., 309 S.W. 2d 491, Tex. Civ. App., er. ref.

Further contention is made that one of the conditions of the grant of authority is that the companies will relocate and remove such facilities when they interfere with the use of the rights of way by the public, as determined by the State or by the political subdivisions or agency thereof, and cite as the general rule 18 Am. Jur. 792, Eminent Domain, Section 161; Southern Bell Tel & Tel Co. v. State ex rel, Ervin, 75 So. 2d 796 (Fla. Sup. 1954); Southern Bell Tel & Tel Co. v. Commonwealth, 266 S.W. 2d 308 (Ky. Ct. App. 1954), and a number of

other cases, most if not all are cited in the above cases.

Articles 1416, 1436a and 1436b, V.A.C.S., in authorizing the laying of utility lines in public roads and highways, outside of the limits of incorporated cities, make reservation for future changes in the public use of such roads and highways.

The ordinances of the two cities granting a franchise to the Telephone Company and the Gas Company provide for control by the City and for relocation of their facilities. Appellant says that it does not rely merely on the City ordinances for the creation of such duty of relocation of such facilities, but rather on the authorities cited in the cases above mentioned, and that a grant without the condition to relocate such facilities would be a void attempt to impair the cities' performance of governmental functions. Citing City of Brenham v. Brenham Water Company, 67 Tex. 542, 4 S.W. 143; Bowers v. City of Taylor, 16 S.W. 2d 521, Comm. App. 1928.

We quote from Article 6674w-4, V.A.C.S.:

> "Whenever the relocation of any utility facilities is necessitated by the improvement of any highway in this State which has been or may hereafter be established by appropriate authority according to law as a part of the National System of Interstate and Defense Highways, including extensions thereof within urban areas, such relocation shall be made by the utility at the cost and expense of the State of Texas provided that such relocation is eligible for Federal participation. Reimbursement of the cost of relocation of such facilities shall be made from the State Highway Fund to the utility owning such facilities, anything contained in any other provision o

law or in any permit, or agreement or franchise issued or entered into by any department, commission, or political subdivision of this State to the contrary notwithstanding. The term 'utility' includes publicly, privately, and cooperatively owned utilities engaged in furnishing telephone, telegraph, communications, electric, gas, heating, water, railroad, storm sewer, sanitary sewer, or pipelines service. The term 'cost of relocation' includes the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility and otherwise as may be fixed by regulations for Federal cost participation. It is further provided that by agreement with the affected utility the State Highway Department may relocate such utility facility in accordance with the provisions hereof."

Appellant contends:

"Article III, Section 51: 'The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever; . . .'

"Article III, Section 50: 'The Legislature shall have no power to give or to lend, or to authorize the giving or lending, of the credit of the State in aid of, or to any person, association or corporation, whether municipal or other, or to pledge the credit of the State in any manner whatsoever, for the payment of the liabilities, present or prospective, of any individual, association of individuals, municipal or other corporation whatsoever.'

"Article III, Section 55: 'The Legislature shall have no power to release or extinguish, or to au-

thorize the releasing or extinguishing, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual, to this State or to any county or defined subdivision thereof, or other municipal corporation therein, except delinquent taxes which have been due for a period of at least ten years.'

"Article XVI, Section 6: 'No appropriation for private or individual purposes shall be made . . .'"

Appellant cites State of Tennessee ex rel. v. Southern Bell Tel and Tel Co. et al, —— S.W. 2d —— (Tenn. Sup. Ct. 1958). (On October 3, 1958 the Court granted petitions for rehearing and set the case down for reargument on ——); Southern Bell Tel & Tel Co. v. Commonwealth, 266 S.W. 2d 308 (Ky. Ct. of App. 1954).

Appellant says that "the enactment of Article 6674w-4 was obviously intended to conform the state law to the conditions set forth in Section 111(a) of the Federal-Aid Highway Act of 1956 (23 U.S.C.A., Section 162), which, at the time of its original enactment, read as follows:

"'(a) Subject to the conditions contained in this section, whenever a State shall pay for the cost of relocation of utility facilities necessitated by the construction of a project on the Federal-aid primary or secondary systems or on the Interstate System, including extensions thereof within urban areas, Federal funds may be used to reimburse the State for such cost in the same proportion as Federal funds are expended on the project; Provided, That Federal funds shall not be apportioned to the States under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State.'

"It was contemplated that Article 6674w-4 would be a device by which the Federal Government would pay 90% of the cost of utility relocation and that the people of this State would pay for only the remaining 10%. This premise is based: first, on the provision of the state law that the State would pay for cost of relocation only if it were eligible for Federal participation; and second, the provision of the Federal-Aid Highway Act of 1956 that Federal aid funds may be used to reimburse the State for the cost of relocation in the same proportion as Federal funds are expended on a given project. . . . The intention of Congress in providing for reimbursement to the States is clarified by the change and addition to the Federal Act (23 U.S.C.A. 162) by its amendment in the Federal-Aid Highway Act of 1958 (Public Law 85-381, 72 Stat. 89) and which provide as follows:

"'Provided, That Federal Funds shall not be reimbursed to any State under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State; Provided further, That such reimbursement shall be made only after evidence satisfactory to the Secretary shall have been presented to him substantiating the fact that the State has paid such cost from its own funds with respect to Federal-aid highway projects for which Federal funds are obligated subsequent to the date of enactment of the Federal-Aid Highway Act of 1958 for work, including relocation of utility facilities.'

"The words 'reimbursed to any State' are substituted for the original words 'apportioned to the States' in the first proviso, and the second proviso was added in its entirety by this amendment.

"This, the availability of Federal funds is condi-

tioned upon (1) the legal liability of the State to pay the cost of relocation and (2) the prior actual expenditure of State funds (rather than Federal funds) for this purpose.

"The primary issue in this suit concerns the expenditure of public monies from the State Treasury, and the possibility of reimbursement of a portion thereof by the Federal Government is of no materiality whatsoever in the determination of the constitutionality of the expenditure of such State funds."

Appellant, with reference to the duty of the cities to relocate their lines, etc. says that the Cities of Dallas and Austin have installed within the rights of way of the Interstate Highway water lines, sewer lines, and their electrical distribution systems, which is admitted.

Appellant concedes that the use of State funds to reimburse a city for the cost of relocating sanitary sewer facilities is not prohibited by Section 51, Article III of the Constitution as it involves a governmental rather than a proprietary function of a city, but contends that such relocation is not part of the construction of a highway and that the use of highway funds for this purpose is prohibited by Article VII, Section 7a of the Constitution.

The functions of a city are of two general classes. Those required of it by law are governmental in nature, and in performing them the city acts as an agency of the State government and also in performing other functions for its own benefit or the benefit of its inhabitants in a corporate or proprietary capacity. City of River Oaks v. Moore, 272 S.W. 2d 389, Tex. Civ. App., er ref., n.r.e.

The dominion over the public streets heretofore delegated to the City of Austin and City of Dallas by the Legislature have been in some degree abridged by the enactment of Articles 6674w-4 through 6674w-5, V.A.C.S., which in brief, provide that the Highway Commission is empowered to lay out a designated highway and provide that any order issued by the Commission shall be superior to ordinances of cities.

The appellant contends that the city is deprived of control of such streets as may become a part of the highway system, and that city-owned utility facilities situated in such streets stand on equal footing with facilities as are owned by private corporations and cite a number of cases, the latest in point of time is City of Mission v. Popplewell, ——Tex.——, 294 S.W. 2d 712.

We believe that the court was justified in granting defendants', appellees' herein, motions for summary judgment and in denying appellant's motions.

We believe that House Bill 179, etc. Article 6674w-4 is valid and constitutional and does not donate public monies to corporations nor is it a gift or loan of the credit of the State, or a release of the obligations of corporations or individuals, or an appropriation for private or individual purposes, in violation of sections 50, 51 and 55 of Article III of the Constitution of Texas, or Section 6 of Article XVI.

These cases involve the power of the Legislature to enact laws for future application and effect under the State's police power.

There can be no question but that the Legislature can lawfully permit cities and private corporations to place facilities in streets and highways to provide essential utility service for the public and may impose reasonable conditions. The State may reserve the power to relocate utility facilities itself, or it may impose that duty upon the users of the streets, with or without reimbursement of all or part of the nonbetterment costs. We believe that the Legislature is not precluded from making changes in the uses or conditions for future application after the original determination of the conditions governing use of the streets, etc.

Police power in its broadest sense can be directed against persons for the prevention and suppression of crimes, and preservation or order and in the interest of the general welfare.

There are limitations under the Constitution, and when police power is directed against persons in relation to property, its ownership and uses, it has been viewed by the courts more closely than the exercise of that power in prevention and suppression of crimes, and the execution of criminal laws.

The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably, and particular individuals may not be singled out to bear the cost of advancing the public convenience.

City of Austin v. Austin Cemetery Ass'n, 87 Tex. 330, 28 S.W. 528; Nashville C. & St. L. R. Co. v. Walters, 294 U.S. 405; Houston & T. C. Ry. Co. v. City of Dallas, 98 Tex. 396, 84 S.W. 648; Fort Worth Improvement Dist. No. 1 v. City of Fort Worth, 106 Tex. 148, 158 S.W. 164.

The Legislature has from time to time exercised its right to repeal, change, modify or abolish the common law as it was adopted in Texas.

Middleton v. Texas Power & Light Co., 108 Tex. 96, 185 S.W. 556, sustaining the constitutionality of the workmen's compensation law, citing cases; Wren v. City of Corsicana, —— Tex. ——, —— S.W. 2d —— (October 29, 1958 not yet reported) is a case reviewing the Municipal Airport Act. Art. 46d-15, V.A.C.S.

In enacting Article 6674w-4 the Legislature applied to the construction of Interstate Highways the same policy it had previously applied to a number of other statutes providing for reimbursement to utility companies of the cost of relocating facilities in public improvement. We will only list a few.

San Patricio Municipal Water District, Art. 8280-145, Sec. 5; Dallas County Water Supply and Control District, Art. 8280-148, Sec. 7; Travis-Williamson County Water Control and Improvement Dist. No. 1, Art. 8280-178, Sec. 6.

Then too, the Legislature is never presumed to have done a vain thing in the enactment of a statute.

Imperial Production Corp. v. City of Sweetwater, 210 F. 2d 917.

There is no question but what the Legislature has the responsibility and is clothed with the authority to formulate the public policy of the State.

McCain v. Yost, 155 Tex. 174, 284 S.W. 2d 898.

In its endeavor in the determination of the public policy the Legislature enacted the statute here in question and included this provision:

> "Whenever the relocation of any utility facilities is necessitated by the improvement of any highway in this State which has been or may hereafter be established by appropriate authority according to law as a part of the National System of Interstate and Defense Highways, including extensions thereof within urban area, such relocation shall be made by the utility at the cost and expense of the State of Texas provided that such relocation is eligible for Federal participation. . . . "

It is apparent that the Legislature has determined that the cost of removal, relocation and adjustment of utilities is a part of the construction of these highways.

Then too, a provision provides:

> " . . . Reimbursement of the cost of relocation of such facilities shall be made from the State Highway Fund to the utility owning such facilities, anything contained in any other provision of law or in any permit or agreement or franchise issued or entered into by any department, commission or political subdivision of this State to the contrary notwithstanding. . . . "

We believe that the statute as enacted with its several provisions are within the province of the Legislature.

Oswego & Syracuse R. R. Co. v. State, 226 N. Y. 351, 124 N. E. 8; City of Beaumont v. Priddie, 65 S.W. 2d 434, Tex. Civ. App., appl. dism. for mootness, 95 S.W. 2d 1290.

Cities have control over their streets.

City of Austin v. Schmedes, 154 Tex. 416, 279 S.W. 2d 326; City of San Antonio v. Bexar Metropolitan Water Dist., 309 S.W. 2d 491, Tex. Civ. App.; er ref.

When the Highway Department was created in 1917 it took advantage of the Federal-Aid Road Act and was given authority to exercise certain control over certain roads, and this Act was sustained.

Robbins v. Limestone County, 114 Tex. 345, 268 S.W. 915.

Subsequently the Legislature directed that the indebtedness incurred by municipal corporations be assumed by the Department.

Jefferson County v. Board of County and District Road Indebtedness 143 Tex. 99, 182 S. W. 2d 908.

Cities and utility companies have large investments in water mains, sewer and gas lines, telephone and other distribution facilities in the streets, public ways, etc., to be displaced by the Interstate and Defense Highway System under construction in Texas. These property rights devoted to public use which are protected by constitutional guarantees are valuable property rights.

Corpus Christi Gas Co. v. City of Corpus Christi, Tex. Civ. App., 283 S.W. 281, er ref.

Article 1416 grants authority to Telephone and Telegraph Companies to place their utility facilities in streets, roads, highways and waters throughout Texas in such manner as not to incommode the public in the use of such roads, streets and waters.

Articles 1436a and 1436b relate to power and gas companies and provide that any such corporation may be required at its own expense to relocate its lines on a State highway or county road outside the limits of an incorporated city or town so as to permit the widening of the right of way, etc.

With the enactment of House Bill 179 the Highway Department was given authority to enter a city for highway purposes without the agreement of city authorities, and extend such Interstate and Defense Highways through incorporated areas.

The statute we are concerned with does not extend credit, nor is any obligation involved, or release, and no public funds are given away.

Reimbursement under these statutes is restricted to the nonbetterment portion of the cost of utility relocations imposed by the Highway Commission. The city or utility companies gain nothing.

The constitutional provisions in issue in these cases are similar to such provisions of other states and were designed to prevent the giving away of public funds and not to deny the Legislature the use of State funds for governmental purposes.

Highway Commission of Texas v. Vaughn, Tex. Civ. App., 288 S.W. 875, er ref.; Byrd v. City of Dallas, 118 Tex. 28, 6 S.W. 2d 738.

Clearly the construction of State highways is a governmental or public purpose and in the public interest.

It is because of the public intent in receiving utility

service that the right of utility companies to use the streets and roads is recognized.

City of Brownwood v. Brown Tel. & Tel. Co., 106 Tex. 114, 157 S.W. 1163; State v. Southwestern Bell Tel. Co. 338 Mo. 617, 92 S.W. 2d 612; City of Aransas Pass v. Keeling, 112 Tex. 339, 247 S.W. 818, sustained an outright gift of funds by the State to the City for construction of seawalls, as being in the interest of the State at large.

In Austin National Bank v. Sheppard, 123 Tex. 272, 71 S.W. 2d 242, a special bill which appropriated funds to reimburse the claimant the amount of the franchise tax which had been collected without lawful authority was upheld.

In Minneapolis Gas Company v. Zimmerman, 91 N.W. 2d 642, the court held that an expenditure of funds to effect the relocation of utility facilities was properly a governmental function exercised for a public purpose of primary benefit to the entire community and such relocation is made necessary in order to expedite public travel and further because there would be an economical loss if the State failed to take advantage of Federal aid.

Similar holdings were made by the Supreme Judicial Court, Opinion of the Justices, 132 A. 2d 440, 152 Me. 451.

Delaware River Port Authority v. Pennsylvania Public Utility Commission, 180 Pa. Sup. 315, 119 A. 2d 855.

We do not believe that House Bill 179, Article 6674w-4 delegates to the United States, its Congress or agencies

certain legislative authority which may properly be exercised only by the Legislature of the State of Texas.

> "The Legislature may not delegate its power to make a law, it may enact a law to become operative upon a certain contingency or future event; . . ." Trimmier v. Carlton, 116 Tex. 572, 296 S.W. 1070.

Minneapolis Gas Company v. Zimmerman, supra; Housing Authority of City of Dallas v. Higginbotham, 135 Tex. 158, 143 S.W. 2d 79; Opinion of the Justices 126 Me. 614, 137 A. 50.

House Bill 179 does not provide for disbursements to be made from the State Highway Fund in a manner or for a purpose prohibited by Section 7a of Article VIII of the Constitution.

As a part of Chapter 300 the Legislature declared the purpose for which it was enacted, as follows:

> "The Legislature finds, determines and declares that the purpose of this act is to delegate certain additional authority to the State Highway Commission to promote the public safety, to facilitate the movement of traffic, to preserve the financial investment of the public in its highways, and to promote the national defense."

As we have stated we believe the statute is constitutional.

Texas Turnpike Authority v. Shepperd, 154 Tex. 357, 279 S.W. 2d 302; State ex rel. Wabash R. Co. v. Public Service Commission, 100 S.W. 2d 522.

The judgment of the Trial Court is affirmed.

ROY C. ARCHER, Chief Justice.

Affirmed
Associate Justice Hughes not sitting
Filed: December 17, 1958.

APPENDIX 15

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, on relation of ROSCOE C. RICH, LEONARD K. FLOAN, and DAVID P. JONES, Idaho Board of Highway Directors, Plaintiff, v. IDAHO POWER COMPANY, a corporation, and THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a corporation, Defendants.	CIVIL 28090 MEMORANDUM DECISION

APPEARANCES: For the plaintiff—Grayden W. Smith, Attorney General for the State of Idaho; Allen G. Shepard and Wm. R. Padgett, Assistant Attorneys General for the State of Idaho.

For the defendant Idaho Power Company—A. C. Inman and James E. Bruce, attorneys at law, Boise, Idaho and Parry, Robertson & Daly, attorneys at law, Twin Falls, Idaho.

For the defendant The Mountain States Telephone & Telegraph Company—Akolt, Turnquist, Shepherd & Dick, attorneys at law, Denver, Colorado by Luis D. Rovira; and Carl H. Nixon, attorney at law, Boise, Idaho.

As amicus curiae in behalf of Rural Electric Company, a non-profit cooperative corporation; and Project Mutual Telephone Cooperative Association Incorporated, a non-profit cooperative corporation—Tom F. Alworth, attorney at law, Filer, Idaho.

This is a declaratory judgment action to determine the constitutionality of Chapter 227, Session Laws of 1957. Said act provides that the Idaho Board of Highway Directors have, among other powers and duties, the power to make reasonable regulations for relocation of the facilities of any utility in, on, along, over or across any project on the Federal Aid primary, secondary or interstate systems, and if, after hearing, it determines that utility facilities should be relocated, the owner utility is required to relocate in accordance with the order of the board, "and the cost of relocation shall be part of the acquisition of rights of way, easements and other rights for the construction, maintenance, repair, improvement and development of the public highways . . . and shall be paid by the State of Idaho out of the state highway fund." Cost of relocation is defined as "the entire amount paid by such utility properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and/or any salvage value derived from the old facility."

Chapter 227, Session Laws of 1957 was obviously enacted by the Idaho Legislature after the Federal Congress by the Federal Aid Highway Act of 1956, 23 U.S.C.A., Par. 162, authorized the use of Federal matching funds to allow reimbursement to the state for such expenditures, in the same proportion as Federal funds

are expended on the project, providing, however, that the law of the state must allow such reimbursement.

It is undisputed by all parties to this action that, under the common law of practically all states and the common law of Idaho prior to the enactment of the statute in question, that where a public utility has been allowed to place its facilities in or along a public highway, any such public utility was bound to relocate its facilities at its own expense whenever public health, safety or convenience required the change to be made. There are many decisions to this effect. Probably the leading case is *New Orleans Gaslight Co. vs. Drainage Commission of New Orleans,* 197 *U.S.* 453, 25 *S. Ct.* 471, 47 *L. Ed.* 831. *See also Transit Commission vs. Long Island Ry. Co., et al,* 171 *N.E.* 565.

The State Highway Board contends that inasmuch as the foregoing is the common-law rule, and in the absence of Chapter 227, the utilities would be required to do any necessary relocation at their own cost, the payment by the state of relocation costs out of the highway fund is lending of the state's credit to the utilities in contravention of Article VIII, Section 2 of the Idaho Constitution which reads as follows:

> "2. *Loan of state's credit prohibited—Holding stock in corporation prohibited — Development of water power.*—The credit of the state shall not, in any manner, be given, or loaned to, or in aid of any individual, association, municipality or corporation; nor shall the state directly or indirectly, become a stockholder in any association or corporation, provided, that the state itself may control and promote the development of the unused water power within this state."

Similar restrictions on the use of public money for private benefit are found in practically all of the states.

In addition, the Highway Directors contend that expenditures of earmarked highway funds for relocation of utility facilities is not "construction, repair, maintenance and traffic supervision of the public highways" and thus contravenes Article VII, Section 17, Idaho Constitution which section provides that the constitutional highway fund shall not be diverted to *any other purpose whatever* other than construction, repair, maintenance, and traffic supervision of the public highways.

Considering first the question of whether the legislation violates Article VIII, Section 2 of the Constitution, (the landing of credit prohibition). A number of cases considering legislation substantially identical or analogous to the legislation here involved, have been decided by various state courts, and all of such cases hold that this type of legislation does not violate this type of provision prohibiting the spending of public funds for private benefit.

Cases considering legislation identical in effect to that here involved are: *Opinion of the Justices,* 132 *A* 2*d* 613 (1957) (*New Hampshire*); *in re Opinion of the Justices,* 132*A* 2*d* 440 (1957) (*Maine*). (Both of these cases were opinions to the constitutionality of proposed legislation identical in effect to Chapter 227); *Baltimore Gas & Electric Co. vs. State Roads Commission,* 134 *A* 2*d* 312 (1957); *Dept. of Highways vs. Pennsylvania P.U.C.* 136 *A* 2*d,* 473 (1957); and the following lower court decisions: *Minneapolis Gas Company vs. Commissioner of Highways of*

Minnesota; District Court of 4th Judicial District, Minnesota, decided March 28, 1958; State Highway Commission vs. Mt. States Tel. & Tel., et al: District Court, New Mexico; and State of Tennessee vs. Southern Bell Telephone, et al, Chancery Court, Nashville, Tennessee (Jan. 1958).

On the narrow issue of the use of public money for private benefit, all of the foregoing decisions held that the use of public money for the non-betterment relocation of utilities, occasioned as the result of construction or reconstruction of public highways, is an expenditure which is public in nature and thus is not in conflict with such constitutional provisions. Generally as long as the expenditure can reasonably be considered to be for a public purpose, the courts have left it to the Legislature's discretion to decide whether such expenditures should be made with public funds.

Although the *Maine court in* 132 *A. 2d.* 440 held that the expenditures could not be considered construction costs under their highway fund anti-diversion prohibition, they held that the purpose of such expenditures would be public in nature, "and the extent and conditions under which the state may meet such costs are for the Legislature to determine."

All of the foregoing cases hold the common-law rule obligating the utility to relocate at its own cost is subject to legislative change.

In Idaho, if the expenditure is for a public purpose, even though founded only on a moral, as distinguished from a legal obligation, and exercises a governmental

function tending to promote the public welfare, it does not conflict with Article VIII Section 2. *Davis vs. Moon*, 77 *Ida.* 146, 289 *P2d.* 614, *Neuland vs. Child*, 73 *Ida.* 530, 254 *P2d* 1066, and *State ex Rel Nielson vs. Lindstrom*, 68 *Ida.* 226, 191 *P2d* 1009.

In cases discussing analogous situations, the courts have consistently held that such expenditures are for a public purpose and do not serve a purely private purpose. One class of such cases is the railroad crossing cases. Illustrative are *Lehigh Valley Railroad Co. vs. Canal Board*, 204 *N.Y.* 471, 97 *N.E.* 964; *Oswego & S.R. Co. vs. State*, 226 *N.Y.* 351, 124 *N.E.* 8; *Westchester Electric Co. vs. Westchester Co. Park Commission*, 255 *N.Y.* 297, 174 *N.E.* 660; *Brook vs. City of Philadelphia*, 29 *A.* 387; *City of Beaumont vs. Puddie*, 65 *S.W.* 2d 434.

In each of these cases the Court recognized that the railroad or utility could, under the police power, be required to do the changing or relocation, usually grade crossing eliminations, at its own expense; nevertheless the above decisions hold that where there will be no actual betterment of the facilities to the public service corporation after the work is done, there is equity and justice in the state assuming all or part of the cost, and thus it is not a gratuitous gift of state funds for a private benefit.

This rule is based on the proposition that there is no benefit to the public service corporation as the result of the change. Its facilities are of no greater value to it or its customers than they were before the relocation, and such is the case under the statute here in question.

Cases such as *City of Cincinnati vs. Barth*, 128 *N.E.* 263, are not analogous to the case at bar because the legislation there involved directly benefited and increased the value of the facilities of the utility by bettering them at public cost.

The Board of Highway Directors urge, however, that the public utilities have had the free use of expensive right of way for many years, and had knowledge beforehand that they would have to move their facilities in the event of highway improvement. This really begs the question and goes to the wisdom of the Legislature in enacting the legislation in question. However, it is interesting to note that several courts have held that the use of public rights of way by utilities is in the public interest. *Cater vs. Northwest Telephone Exchange Co.*, 63 *N.W.* 111. In *State ex rel McKittrick vs. Southwestern Bell Telephone Co.*, 92 *SW* 2*d* 613 (*Missouri*), the use of highway right of way for utility facilities was attacked on the ground that the utilities had paid nothing for the privilege and that therefore it was a gratuitous grant of public money or property in violation of a constitutional provision similar in effect to Article VIII, Section 2, Idaho Constitution. The Missouri court said: "The General Assembly no doubt considered that the benefit to the general public arising from the promotion of the extension of such service justified the granting of the privilege of the use of the highways. While that benefit may not be said to be a formal consideration, as that term is generally understood, yet it is that benefit and that consideration which takes this grant out of the grants prohibited by the constitution." To the same effect, see *Arkansas State Highway Commission vs. Southwestern Bell Telephone Co.*, 178 *SW* 2*d* 1002; and *Los*

Angeles Co. vs. Southern Bell Telephone Co., 196 *P2d* 773. The Idaho Legislature has apparently long considered it to the public benefit to allow utilities to use the highway rights of way without consideration in the usual sense for their facilities, as this privilege has been recognized and granted by Idaho statutes since an early day. See Sections 62-701 and 62-705, Idaho Code. Thus the public utilities cannot be considered purely gratuitous beneficiaries of the use of said rights of way. Although the defendants herein are now large corporations, small utilities such as the REA's, mutual and cooperative telephone companies, are vitally interested as shown by the appearance of several as amicus curiae in this action. This Court cannot say as a matter of law that the state does not have a valid public interest in seeing that all utilities, large or small, are able to serve their customers at the least possible expense to the customer. Thus the Court concludes that it can be fairly said that the Legislature of the State of Idaho in its discretion had the power to determine that the legislation was in the public interest. The Court therefore concludes that Chapter 227 Session Laws of 1957 does not violate Article VIII, Section 2, of the Idaho Constitution.

In considering the second constitutional question involved, (the highway fund anti-diversion clause) there is more conflict in the decisions than there is on the question of lending the public credit.

Our Supreme Court has recently considered Article VII, Section 17, in the case of *State vs. Jonassen*, (78 *Ida.* 20[illegible] *P2d* 755), in which the Court held that an appro[illegible] the Department of Commerce and Development [illegible] of highway funds to be used to advertise

the State, could not be construed as highway construction. The decision is of little assistance in determining the question here involved, because it is limited to the factual situation there involved, and advertisement of the state is obviously more remote from the constitutionally allowed uses of highway funds than the relocation of utility facilities necessitated by highway construction.

In the *Opinion of the Justices (of Maine)* 132 *A2d* 440, already mentioned, the justices, although they held such expenditures would be for a public purpose, did hold that relocation of a utility could not be considered a highway construction cost, saying:

> "We do not commonly consider that a power company in erecting a pole line or a water district laying a pipe in a highway is constructing a highway. To an even lesser degree would we consider the construction of a pole line or a water pipe across country to be the construction or reconstruction of a highway, although the reason for the relocation was occasioned solely by changes in the highway."

To similar effect is the dissenting opinion of Judge Rhodes in *Dept. of Highways vs. Penn. Public Utility Commission,* 136 *A2d* 473, and the opinion of the Georgia court, *Mulky vs. Quillion,* 213 *Ga.* 507, 100 *S.E.* 2*d* 268 (1957).

As against these two decisions and one dissent, there are the following decisions holding that nonbetterment relocation of facilities of the type here under consideration can properly be considered an expense of construction of a public highway. *Dept of Highways vs. Pa. P.U.C* 136 *A2d* 473; *Opinion of the Justices (of New*

Hampshire) supra; and the Minnesota District Court decision *Minneapolis Gas Co. vs. L. P. Zimmerman, Commissioner of Highways,* hereinbefore mentioned.

The basis of the reasoning of these courts is as the Pennsylvania court put it:

> "In building a highway it is as necessary to remove the utilities on the rights of way, including those on existing highways, as it is to remove the trees and to make fills and cuts and pave the roadway."

It seems to this Court that this is the more reasonable interpretation. It is common knowledge that the highway department frequently relocates farm fences, irrigation works and driveways when it widens or reconstructs a highway, and the expense of doing so is an incident to and properly considered a cost of construction. The non-betterment relocation of utility facilities, necessitated by highway improvement, can fairly be said to be reasonably and directly related to construction of a new highway. Thus this Court is of the opinion that it cannot as a matter of law say the Legislature has abused its discretion in deciding to authorize the use of highway funds for such purposes.

Counsel for defendants are requested to prepare proposed conclusions of law and judgment in accordance with Rule 85, Uniform Rules of Procedure.

Dated and signed this 3rd day of July, 1958.

(Signed) Merlin S. Young
District Judge

APPENDIX 16

NORTHWESTERN BELL TELEPHONE COMPANY, an Iowa corporation, Plaintiff, VS. A. W. WENTZ, as Highway Commissioner for the State of North Dakota, Defendant

Memorandum Opinion

The above-entitled action involves the constitutionality of a statute enacted by the Legislature in 1957, being SB 166 and being Chapter 195 of the 1957 Session Laws, Section 24-0141 of the 1957 Supplement to the 1943 Revised Code of North Dakota.

This statute in effect provides that when utilities located on a national system of defense highways qualifying for Federal aid and are to be changed, removed and relocated on account of construction of the highways of the national system of interstate and defense highways, the cost of such removal, not including increased value and after deducting salvage value of the old facility, the cost of such removal shall be ascertained and paid by the State as part of the costs of such Federally-aided projects.

This chapter was enacted pursuant to an act of Congress which provides in effect that, when approved by the State, 90 per cent of removal costs shall be paid by the Federal Government and 10 per cent by the State.

The facts have been stipulated by the parties, and this action is brought for the purpose primarily of procuring an opinion from the Supreme Court on the constitutional questions involved.

The Attorney General appeared for the State and William R. Pearce, of the firm of Cox, Pearce & Engebretson, appeared for the Plaintiff.

Exhaustive briefs have been filed by both parties. Factual background has been set forth in plaintiff's brief and needs not be repeated here.

The attack on constitutionality is made on the following provisions of the Constitution:

(1) That the statute violates Section 185 of the Constitution in that it permits the State to loan money, give its credit to or make donations to or in aid of a private corporation;

(2) That the statute violates Article 56 of the Amendments to the Constitution and Section 186 of the Constitution in that it permits diversion of highway funds to other purposes;

(3) That the statute would confer special privilege upon plaintiff in violation of Sections 11, 20, 70 and Subsection 20 of Section 69 of the Constitution; and

(4) That the statute abridges the police power of the State in violation of Section 134 of the Constitution.

A similar statute under similar provisions of the Constitution has been before at least four state supreme courts.

Minneapolis Gas Company vs. Zimmerman, 91 NW 2nd 642, wherein the Minnesota court held that no violation

of the constitution occurred. Defendant attempts to distinguish the Minnesota and North Dakota laws on the use of public streets or highways in that Minnesota has long considered communication systems as a proper use of highways and streets and North Dakota has not, and defendant cites the case of Donovan vs. Albert, 11 ND 289, as authority for such distinction.

The Donovan case was decided many years ago and the Supreme Court had much difficulty in determining the matter. The case was long before the apparently accepted practice of the State in permitting utility lines on highways and streets.

In that case the poles were placed in position so that they interfered with the plaintiff's use of his property for free access. The Court said, "If within the original purpose and he is not obstructed in gaining access to his lot or building and not deprived of light or air, he is not entitled to relief or compensation."

The Donovan case would appear to be authority for the use of streets and highways for utility purposes when they did not restrict the rights of the fee owners.

The case of State of Texas vs. City of Austin, et al, filed December 17, 1958, and probably not yet reported, also is authority for the validity of a similar law as constitutional and under similar conditions. Both above cases were decided by unanimous courts.

The case of State of Tennessee, ex rel vs. Southern Bell Telephone and Telegraph Company held a similar act unconstitutional with a vigorous dissenting opinion

by Judge Tomlinson, who agrees with the Minnesota court.

The case of State Highway Commissioner of New Mexico vs. Southern Union Gas Company is also authority for holding the law to be unconstitutional, unless changed later on rehearing of which this Court is not advised.

The reasoning on both sides of the question is good, and whichever way a court decides he may say that he has good precedent and is in good company.

This Court is persuaded in this opinion by the reasoning in Minneapolis Gas Company vs. Zimmerman and believes such reasoning to be correct; and when considered with the strong presumption of the law enacted being constitutional, that the police powers of a state are bound to become enlarged by changing conditions and that communications are in fact a public use, the Court finds that Section 24-0141 is not in violation of the provisions of the Constitution of North Dakota.

This opinion, in view of certain statements in defendant's brief wherein defendant imputes to Judge Mattson of Minnesota a somewhat corrupt motive and influenced as probably being a stockholder in the Minneapolis Gas Company, is written by this Court with due regard to the fact that this Court is not a stockholder in any utility company except the Montana-Dakota Utilities Company wherein this Court owns two shares of stock.

The Court resents the attack on the integrity of the

Minnesota Supreme Court as expressed in defendant's brief.

The Court does not deem it necessary to outline all of the reasoning involved as such is stated in the decisions cited much more forcibly and better than this Court could do.

Plaintiff may prepare appropriate Findings and Order.

Dated this 24th day of February, 1959.

By the Court;

C. L. FOSTER
DISTRICT JUDGE

Since preparation of this opinion the Court has noted that the Supreme Court of Pennsylvania has held a similar act to be unconstitutional, reversing the Superior Court. The opinion is not available and attention is called to it for the benefit of the parties.

C. L. FOSTER

Footnote:

Further investigation since this Petition went to press reveals Judge Foster in his note was probably either referring to

Delaware River Port Authority v. Pa. Pub. Service Com. 145 Atl (2d) 172,

or

Dept. of Highways v. Pa. Pub. Service Com. 145 Atl (2d) 538

Both cases involved an entirely different statute granting certain authority to the Pennsylvania Public Service Commission. They held the statute not broad enough to cover *non-transportation utilities.*

The Court in discussing the common law rule requiring utilities to relocate at their own expense said at page 175 of the Delaware Port Authority case above:

"This common law rule, however, may be abrogated by a *specific statutory mandate* directing the payment of re-location costs to the non-transportation utilities involved

APPENDIX 17

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK.

V. L. (PAT) JONES,

Plaintiff,

vs.

HARRY L. BURNS, L. V. SWANSON, OTIS S. WATERS, S. N. HALVORSON, and ROY L. SORRELLS, as Members of and Constituting the Montana State Highway Commission,

Defendants.

No. 26569.

THE MONTANA POWER COMPANY, a Corporation; MONTANA-DAKOTA UTILITIES COMPANY, a Corporation; PACIFIC POWER AND LIGHT COMPANY, a Corporation; and, THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation,

THREE RIVERS RURAL TELEPHONE CO-OP; MID-RIVERS TELEPHONE ASSOCIATION; NORTHERN TELEPHONE ASSOCIATION; TRIANGLE TELEPHONE ASSOCIATION; NEMONT TELEPHONE ASSOCIATION; VALLEY TELEPHONE CO-OP; and, BLACKFOOT TELEPHONE CO-OP, each a corporation,

RAVALLI COUNTY ELECTRIC CO-OPERATIVE, INC.; SUN RIVER ELECTRIC CO-OPERATIVE,

INC.; LOWER YELLOWSTONE RURAL ELECTRIC ASSOCIATION, INC.; VIGILANTE ELECTRIC CO-OPERATIVE, INC.; MISSOULA ELECTRIC CO-OPERATIVE, INC.; FLATHEAD ELECTRIC CO-OPERATIVE, INC.; FERGUS ELECTRIC CO-OPERATIVE, INC.; PARK ELECTRIC CO-OPERATIVE, INC.; MID-YELLOWSTONE ELECTRIC CO-OPERATIVE, INC.; BEARTOOTH ELECTRIC CO-OPERATIVE, INC.; BIG HORN COUNY ELECTRIC CO-OPERATIVE, INC.; BIG FLAT ELECTRIC CO-OPERATIVE, INC.; SHERIDAN COUNTY ELECTRIC CO-OPERATIVE, INC.; NORTHERN ELECTRIC CO-OPERATIVE, INC.; VALLEY COUNTY ELECTRIC CO-OPERATIVE, INC.; McCONE COUNTY ELECTRIC CO-OPERATIVE, INC.; GOLDENWEST ELECTRIC CO-OPERATIVE, INC.; MARIAS RIVER ELECTRIC CO-OPERATIVE, INC.; HILL COUNTY ELECTRIC CO-OPERATIVE, INC.; TONGUE RIVER ELECTRIC CO-OPERATIVE, INC; SOUTHEAST ELECTRIC CO-OPERATIVE, INC.; and, LINCOLN ELECTRIC CO-OPERATIVE, INC.,

Intervenors.

THE COURT'S ORDER ON DEMURRER

This action seeks a Declaratory Judgment with respect to the constitutionality of Chapter 254, Session Laws of Montana, 1957, and is presented to this Court upon the Second Amended Complaint of Plaintiff, V. L. (Pat) Jones, against the named Defendants, as members of and constituting the Montana State Highway Commission. Subsequently, and because of their vital interest in the provisions of Chapter 254, 33 privately and cooperatively owned utilities filed Intervenor Petitions and were

granted permission to intervene in this action as parties Defendant. The Intervenors, as well as the original Defendants, having demurred to the Second Amended Complaint, which demurrers were filed pursuant to stipulation and order of the Court, on the ground that said Second Amended Complaint, and each cause of action therein, does not state facts sufficient to constitute a cause of action, and request therefore that the said Second Amended Complaint be dismissed.

In the Second Amended Complaint, according to the allegations therein, the proper party Plaintiff alleges that Chapter 254 violates 5 sections of the Montana Constitution, one section of the United States Constitution, and, violates, and is in contravention of a United States Statute, and as a result thereof prays for an Order and Judgment of this Court holding that said Chapter 254 be declared unconstitutional, and that said Defendant, the Montana State Highway Commission, is without right or authority to expend state tax funds or federal funds received by said Commission for the purposes set forth in said Chapter 254.

After the filing of extensive briefs, and the hearing of oral arguments before the Court, and the Court being fully advised in the premises, and said cause being submitted upon the Demurrers of the Defendant and Intervenors, THE COURT DOES HEREBY FIND:

In the very extensive briefs submitted herein, and in the oral argument presented to the Court, all parties are in agreement and in accord with the questions presented to this Court, and in the order of their appearance. Thus, in the interests of continuity and uniformity, this opinion will take up and follow, in order, the questions as set

out in the briefs of the Mountain States Telephone and Telegraph Company, a Corporation, and the Plaintiff, V. L. (Pat) Jones, herein.

I.

CHAPTER 254, SESSION LAWS OF MONTANA, 1957, WAS INTENDED TO PARTIALLY REIMBURSE PUBLICLY, PRIVATELY AND COOPERATIVELY OWNED UTILITIES FOR THE COST OF RELOCATING THEIR FACILITIES ON FEDERAL-AID HIGHWAY PROJECTS AND TO ALLOW THE STATE OF MONTANA TO ACCEPT FEDERAL AID AVAILABLE FOR SUCH PURPOSES.

It is very apparent, and there is no argument by the parties herein that the Common Law provided that utilities relocate their facilities at their own expense when necessitated by highway reconstruction or improvement. It also is clear that Congress, by the adoption of Section 111, attempted to amend this Common Law doctrine. The question herein regards the intention of Congress in this amendment.

As stated by Plaintiff, his contention is that the Federal Statute "was passed to allow Federal participation in the costs of relocation charges for utility moves where the state is under a legal obligation to make such payments," and that it was Congress' intent "to, in part, lighten the burden upon the state in those cases where, by law, the state was obligated to assume such a burden."

In the words of the Intervenors, Section 111 "was intended to authorize the Federal Government to partici-

pate in the cost of relocating utilities' facilities necessitated by highway construction whenever a state allows and pays such cost to the utility." And that "The passage of the Federal-Aid Highway Act of 1956 was not sufficient in itself, however, to permit federal funds to be used to pay the relocation costs of utilities caused by construction of Federal-Aid highway projects." And further, "Accordingly, the Montana Legislature enacted Chapter 254, Session Laws of Montana, 1957, sometimes hereinafter referred to as the Relocation Law."

Thus it appears to this Court that by the adoption of Chapter 254, the Montana Legislature created a legal obligation upon the State to make the payments as provided therein, and to allow the State to accept the federal aid available for such purposes, if, of course, said enactment was constitutional, which question will be taken up later in this opinion.

II.

REIMBURSEMENT BY THE STATE TO PUBLICLY, PRIVATELY AND CO-OPERATIVELY OWNED UTILITIES FOR RELOCATION OF FACILITIES AS AUTHORIZED BY CHAPTER 254, SESSION LAWS OF MONTANA, 1957, IS A CONSTITUTIONAL EXERCISE OF THE POLICE POWER BY THE STATE OF MONTANA.

Under this Title, Plaintiff's contention is "that based on a number of constitutional prohibitions and limitations the Legislature has in this instance exceeded its power in passing Chapter 254."

No argument is made as to the Court's authority to

review the exercise of the police power of the legislature, nor is there any question presented herein as to the Court's jurisdiction to inquire into the nature and validity of an alleged police power statute which has been passed by the legislature; however, the Court is bound and governed, as pointed out in Plaintiff's brief, by the Supreme Court decision of State ex rel DeFresne, Relator, vs. Leslie, et al, County Commissioners, Respondents, 100 Mont 449 (454), wherein it is stated, "In considering the validity or invalidity of legislative acts, we are governed by well established rules. One is that every doubt must be resolved in favor of the validity of the legislative act. (Citing cases) A second is that while legislative construction of a statute is entitled to consideration, it is not binding on the courts. (Citing cases) A third is that with reference to the subjects upon which the Constitution assumes to speak, its declarations are conclusive upon the legislature. (Citing cases) A fourth is that constitutional provisions are conclusive upon the legislature and prevent the enactment of any law which extinguishes or limits the powers conferred by the Constitution. (Citing cases) A fifth is that the state government being divided into three separate and distinct branches, the officials of one branch may not usurp or exercise the powers of either of the others. (Citing cases) A sixth is that the Constitution vests in the courts the exclusive power to construe and interpret legislative acts, as well as provisions of the Constitution. (Sec. 3, Art. VIII, Const.) The soundness of these provisions of law and the rules enumerated will not, we think, be questioned." And further by the decision in O'Connell vs. State Board of Equalization, et al, 95 Mont 91 (107), wherein the Court said, "This court has long indulged every possible presumption in favor of the constitution-

ality of a legislative act. In a per curiam opinion in the test case involving the validity of state highway debentures it was said: 'At the threshold we bear in mind that every presumption must be indulged in favor of the constitutionality of the act; every reasonable doubt must be resolved in favor of legislative action.' The question for the court's determination is not whether it is possible to condemn but whether it is possible to uphold the act. When two constructions are possible, one which will result in declaring the statute constitutional and the other unconstitutional, the court without hesitation will pronounce in favor of its constitutionality. (State ex rel Diederichs v. State Highway Commission, 89 Mont 205; 296 Pac 1033, 1034.)"

The theory of Plaintiff's objection herein is that the utilities, having been granted, free of any cost, the right to construct and maintain their facilities upon the state owned rights-of-way, are, in fact, guests of the state on these rights-of-way, and due to the fact that the utilities have paid nothing for this franchise, they are not now entitled to reimbursement for necessary relocation costs, and Chapter 254, enacted by the State Legislature, and granting to the utilities such relocation costs, constitutes an unconstitutional abuse of the police power.

Plaintiff admits, and correctly so, that, "It is not now nor has it ever been questioned by the Plaintiff that there is not an obligation to pay 100 percent of relocation costs in the case where the utilities are located on their own or otherwise privately owned rights-of-way. In such cases they are and should be treated exactly as any other private owner."

Thus the question is presented to the Court as to what is the legal status of the utilities upon the State owned rights-of-way.

In the opinion of this Court, the answer to the question presented herein is the key to the solution of the entire controversy presented in this cause, for the determination of the legal status of the utilities' facilities upon the State owned rights-of-way controls and definitely answers all of the constitutional questions presented herein. In other words, it is the opinion of this Court that if Plaintiff's contention is correct, and the utilities' legal status is that of a guest or invitee upon the rights-of-way of the State, and that they possess no other legal status therein, then, and in that event, their position, and rights as a guest, are limited to the decisions and the will of the State, and that in making their installations thereon, they did so with full knowledge that at some future date they might be required to relocate those facilities at their own cost.

Unquestionably there is much to be said, and there is a great deal of authority, in support of Plaintiff's contention upon this point, for, as heretofore cited, this was the Common Law theory, and the view definitely established in all jurisdictions, and particularly in the State of Montana, as is evidenced by the permits granted to the utilities by the Highway Commission, as will be noted in Section 5, Exhibit B, submitted by Plaintiff. Up to this point there is no disagreement by the courts, the legislature, the Highway Commission, or the utilities; however, now a very definite change has taken place by the enactment in 1956 by the 84th Congress of the United States of the Federal Aid Highway Act, 23 U.S.C.A.

§ 151, et seq, which provided for the construction of 41,000 miles of interstate highways.

Up to this point it was well understood by all parties concerned that the *normal* development of the states, and the *normal* improvement of their highway program, would require some changes in highway relocations, which, in turn, would require relocation of the utility installations upon highway rights-of-way, and that said relocations were properly the obligation of the utilities to accept, and in this regard, to care for these conditions, the utilities should have made adequate provisions in their financial structure to make these known and anticipated expenditures; however, by the enactment of the Federal Aid Highway Act of 1956, the *normal* highway development program of the separate states, and the federal program, were decidedly changed and advanced beyond any anticipated expectations of anyone, including the utilities.

As a result of this tremendous project, Congress recognized that instead of the normal anticipated relocations of the utilities upon the state owned rights-of-way, now a situation of emergency existed in that instead of a few miles of relocations each year, the utilities would now be required to make thousands of miles of relocations within a short period of time, and that few, if any, could withstand this financial burden thus placed upon them. Thus, recognizing this state of emergency, Section 111 of the Act was enacted.

Following in line with the Federal enactment, the State of Montana enacted Chapter 254, by which the Common Law was definitely reversed, and statutory law

enacted in lieu thereof, which makes an exception, under this Federal Aid program, to meet and make adequate provision for the emergency that is created under this program. and, in effect, to change the legal status of the utilities from that of a guest, without legal rights, privileges, or legal status, to that of one holding and owning a property right, and thereby entitled to their relocation costs, or so much thereof as the law does allow.

Therefore, this Court is of the opinion that Chapter 254 is constitutional and a legal exercise of the police power by the Legislature of the State of Montana, and this Court is in accord with the finding of the Minnesota Supreme Court in the case of Minneapolis Gas Co. vs. Zimmerman, 91 NW 2d 642, wherein the Court said: ". . . The relocation, construction, or reconstruction of highways clearly relates to the safety, security, and general welfare of the citizens of the state, and all steps taken in furtherance of these objects—inclusive of the relocation of utility facilities upon rights-of-way—are matters within the police power of the state . . ."

III.

PAYMENT BY THE STATE OF MONTANA THROUGH THE STATE HIGHWAY COMMISSION TO UTILITIES FOR RELOCATING THEIR FACILITIES PURSUANT TO CHAPTER 254, SESSION LAWS OF MONTANA, 1957, WILL NOT CONSTITUTE AN UNCONSTITUTIONAL DIVERSION OF HIGHWAY FUNDS.

The question presented under this phase of the case presents the Plaintiff's objection that Chapter 254 is

unconstitutional as being repugnant to the provisions of Article XII, Section 1 (6) of the Montana Constitution, and the question resulting is ". . . whether or not such payments for utility relocation can be included within the terms 'cost of construction, reconstruction, maintenance and repair of public highways, roads, streets and bridges.'" It follows that if said payments to utility companies for relocation costs are not a "cost of construction, reconstruction, maintenance and repair of public highways, roads, streets and bridges" then Chapter 254 must be held unconstitutional.

In reading the briefs submitted herein, and after the oral argument of counsel, the Court is well aware that this point has also been decided both ways by Supreme Courts throughout the United States, and decisions rendered both ways where the question is presented under identical circumstances as are found herein. Thus, the Court has no set precedence that might be followed in rendering its decision; however, this Court does recognize the ruling of the Montana Supreme Court in the case of State ex rel McMaster, et al, vs. District Court of the Fourteenth Judicial District, in and for Broadwater County, Montana, et al, 80 Mont 228; 260 Pac 134, wherein, in effect, it is the understanding of this Court that our Supreme Court held that the power given to the State Highway Commission by the Legislature to "construct" highways, includes the power to purchase rights-of-way, regardless of the fact that the meaning was given a different interpretation by the federal law. (8A Words & Phrases 478)

It would seem to follow therefrom that if the Legislature has the constitutional authority to declare that the

purchase of rights-of-way may be considered as a "cost of construction" in reference to the restriction of distribution of highway funds, that they also would have the authority to make provisions for the clearing of said rights-of-way, preparatory to the actual construction, and, as stated by the Pennsylvania Supreme Court in the case of Department of Highways v. Pennsylvania Public Utility Commission, 136 Atl 2d 479, "In building a highway it is as necessary to remove the utilities on the right-of-way, including those on the existing highways, as it is to remove the trees and to make the fills and cuts and pave the roadway. It seems to us that as the expression would be commonly understood, 'expense of such construction' would include the cost of the necessary relocation of utilities. And in Opinion of the Justices (N. H.), 132 Atl 2d 613, (616), wherein the court held: ". . . The relocation of utility facilities is an integral part of highway improvements. The Legislature, if it chooses to do so, may validly declare that the relocation of utility facilities is part of the cost of highway relocation and reconstruction and shall be paid out of highway funds."

In addition to the foregoing, and in furthering the reasoning advanced under Point II in this opinion, this Court is unable to differentiate any distinction in the position of the utilities involved herein (that is, those now requiring relocation from state owned rights-of-way), and those who own privately owned rights-of-way. There is no question presented herein that the relocation costs upon privately owned rights-of-way are a proper and lawful "cost of construction" but Plaintiff does contend that the relocation cost upon state owned rights-of-way are not proper or lawful "costs of construction," and this Court is unable to see any difference therein, or

any way that the Court can hold any different than did the Minnesota Court in the case of Minneapolis Gas Company vs. L. P. Zimmerman, quoted in Intervenor's Brief, Page 21, as follows: "In view of the fact that the transmission of utility services is one of the general and primary purposes for which highways are designed, it would be unrealistic to construe the broad language of Minnesota Constitution Article XVI, Sections 2 and 6, so narrowly as to prohibit the Legislature from authorizing the use of highway funds for the non-betterment location of utility services as a proper cost of highway construction, reconstruction, improvement and maintenance. It would be unreasonable to hold that the proceeds of the highway fund may not be expended for whatever is reasonably necessary to the complete accomplishment of all the basic purposes for which a highway exists. If we were to conclude otherwise we would not only disregard the broad language of the Constitution but also the principle that, since an Act is presumed to be constitutional, it will not be declared unconstitutional unless its invalidity appears clearly or unless it is shown beyond a reasonable doubt that it violates some constitutional provision. The power of the court to declare a law unconstitutional is to be exercised only when absolutely necessary in the particular case and then with great caution."

IV.

REIMBURSEMENT BY THE STATE TO PUBLICLY, PRIVATELY AND CO-OPERATIVELY OWNED UTILITIES FOR RELOCATION OF FACILITIES AS AUTHORIZED BY CHAPTER 254, SESSION LAWS OF MONTANA, 1957, DOES NOT CONSTITUTE A DONATION OR LENDING OF THE

CREDIT OF THE STATE IN VIOLATION OF ARTICLE XIII, SECTION 1 OF THE CONSTITUTION OF MONTANA.

Both the Plaintiff and the Intervenors herein seem to be in agreement that the question involved under this Title is: "The question for decision is whether expenditures for the costs of relocation of utility facilities are expenditures for a public purpose."

It should first be noted that the Montana Supreme Court in the case of Willett vs. State Board of Examiners, 112 Mont 317; 115 Pac 2d 287, has established the test for the Courts to determine this question, in the following language: "The test to be adopted in determining whether a donation or grant is prohibited under this section is whether the grant is for a public purpose. (Citing cases) What is a 'public purpose' is a question primarily for legislative determination, with which we will not interfere unless there has been a clear abuse of power."

The first point raised by Plaintiff is: ". . . it is the nature or capacity of the recipient that is determinative as to whether or not the grant or an appropriation of public moneys is in violation of the constitutional section here involved. The utility companies, which would be the recipients of the moneys, from said Chapter 254, are private corporations." However, in the case of Stanley vs. Jeffries, 86 Mont 114; 284 Pac 134, our Court held: "The mere fact that the money raised will go to individuals will not condemn the act in question, since the test is not as to who receives the money, but is the purpose for which it is to be expended a public purpose? . . ."

Thus it seems that the question of who receives the

actual financial benefits of this legislation is not a material question to be considered in determining the primary question involved herein.

In determining the question now involved herein, several states have now ruled upon this particular point, with facts, for all practical purposes, identical with those presented herein, and it will be noted that two different conclusions have been reached by the courts, in that one group have held that this law (Chapter 254) is definitely for a public purpose, and the other group holding that the law is not for a public purpose, and therefore unconstitutional.

The New Mexico decision, a very recent decision rendered November 14, 1958, presents most of the decisions, and cites liberally from many of the important decisions that have ruled upon this question, and reference is hereby made to that decision of State Highway Commission of New Mexico vs. Southern Union Gas Company, 332 Pac 2d 1007.

In upholding the constitutionality of this legislation, the Minnesota Court, in the case of Minneapolis Gas Company vs. Zimmerman, supra, held: "Although gratuities and benevolences of public monies in aid of private undertakings are prohibited, Minnesota Constitution, Article 9, §§ 1 and 10, does not prohibit the legislature from, by prospective action . . . fixing the conditions of performance and making provisions for the future recognition of claims for damages founded on equity and justice, although such claims would otherwise be damnum absque injuria and unenforceable against the state." Further the Minnesota Court said at Page 651: ". . .

where it becomes reasonably necessary to relocate such utility facilities in order to improve the highway for public travel (and especially so, as to a highway designed to facilitate interstate travel and commerce and to further the common defense) an expenditure of funds to effect such relocation is properly a governmental function exercised for a public purpose of primary benefit to the entire community."

Along this same theory is the Maine decision, quoted therein, where the Court held: "The state, however, may, in our view, pay for the cost of relocating such facilities, if it chooses to do so. The purpose of such expenditures is public in nature, and the extent and conditions under which the state may meet such costs are for the legislature to determine." And the New Hampshire decision, in which that Court held: "The common law rule which places the costs of relocating utility facilities on the owner "specifically admits of legislative change."

The theory of the opposite view, in which the courts have held this statute unconstitutional, is set out in the Tennessee case of State of Tennessee, ex rel, Leech v. Southern Bell Tel. & Tel. Co. (from original opinion) wherein the Court said: "Now, with this situation in mind, this statute directing the expenditures of state funds to reimburse utilities for adjusting or removing their facilities from publicly owned right-of-way so that a state highway may be improved is primarily for the benefit of subscribers of utilities on their stockholders, and is neither a state nor a public purpose."

This Court is unable to follow the reasoning advanced by the Tennessee Court and the New Mexico Court in

their holding that the primary purpose of this expenditure of state funds to the utilities for their relocation costs is for the convenience and benefit of the utilities. Certainly the utilities are being benefitted by being reimbursed for their expenses necessitated by the relocation of their facilities, but this is not the primary purpose of the legislation. The primary purpose of the legislation is to clear the right-of-way for the highway construction, and in so clearing the highway, the utilities' facilities must be relocated, through no fault or act of the utilities, and by this new relocation the utilities gain nothing over what they formerly had, and, as a matter of fact, they merely retain (in another location) that which they formerly possessed. Thus, there can be no convenience or benefit to the utilities derived from this change, but they should definitely be entitled to their damages founded upon equity and justice.

It is the ruling of this Court, therefore, that the Legislature's determination that this is for a "public purpose" will not be disturbed, as, in my opinion, there has been no clear abuse of the legislative power.

V.

REIMBURSEMENT BY THE STATE TO PUBLICLY, PRIVATELY AND CO-OPERATIVELY OWNED UTILITIES PURSUANT TO CHAPTER 254, SESSION LAWS OF MONTANA, 1957, DOES NOT VIOLATE ARTICLE III, SECTION 11, ARTICLE V, SECTIONS 29 AND 39 OF THE MONTANA CONSTITUTION AND ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION.

A. THE RELOCATION LAW DOES NOT VIOLATE THE IMPAIRMENT OF OBLIGATION OF CONTRACT PROVISION OF THE MONTANA AND UNITED STATES CONSTITUTION.

Under this sub-title Plaintiff contends that Chapter 254 violates Article III, Section 11 of the Montana Constitution and Article I, Section 10 of the United States Constitution, prohibiting the impairment of contract obligations.

This Court can find no merit to Plaintiff's contention upon this point, for it is apparent that the agreement made by the Highway Commission to the utilities herein, and evidenced by the exhibits attached to Plaintiff's Amended Complaint, are permits given in compliance with legislative direction, as found in Section 70-301 of the Revised Codes of Montana, 1947, upon which there is no question presented herein as to its legality; however, under the permits so issued, the Highway Commission incorporated therein, as one of the conditions of the permit that (Paragraph 5, Exhibit B of Plaintiff's Amended Complaint) "CHANGES IN HIGHWAY. If state changes highway necessitating changes in structures or installations installed under this permit, Permittee shall make necessary changes without expense to state." This is the accepted Common Law, and the Montana law, in the absence of other legislative and statutory enactment; however, the legislature did amend this Common Law by the enactment of Chapter 254, which this Court has heretofore ruled to be a constitutional exercise of its legislative power, and it is further the ruling of this Court that said enactment does not violate the impairment of obligation of contract provision of the Mon-

tana and United States Constitutions, and for the further reason, as set out by the Court in the case of Minneapolis Gas Company vs. Zimmerman, supra, wherein the Court said: "... the preexisting contract established by Plaintiff's applications to occupy the right-of-way and the occupancy permits issued by the state, created a contractual relation between two parties, the state and the Plaintiff. No third parties have acquired any rights under or pursuant to the contract. It is elementary that where all parties to a contract mutually agree, by conduct or express words, to amend, rescind, or abrogate a contract, in whole or in part, such mutual action does not impair the obligation of contract within the prohibitory clauses of either the Federal or state constitutions. Initially the contract was entered into in behalf of the state by the commissioner of highways. Thereafter, the legislature—which is the highest representative authority through which the state can act—had the power by statutory enactment to amend the contract with the other contracting party's consent where no rights of third parties had in the meantime intervened. It is also well recognized that, if an administrative agency has entered into a contract as an agent of the state, the state (as the principal) may consent to release the other party from part or all of its obligations thereunder." And further the Minnesota Court said: "In the second place, there is no impairment of the obligation of contract since all contracts made by the state are entered into subject to the implied condition that they are ever subordinate to a reasonable and proper exercise of the state's inalienable police power."

B. THE RELOCATION LAW DOES NOT VIOLATE ARTICLE V, SECTION 29 OF THE MONTANA CONSTITUTION.

This Court is unable to see any application of this constitutional provision to Chapter 254, in that no provision is made for payment to the utilities of any extra compensation after services shall have been rendered or contract made without previous authority of law. In other words, "The Relocation Law does not require the payment of *extra* compensation, but merely requires compensation for removal of facilities *after* the passage of the Law. The payment to utilities is expressly authorized by the statute and the claims of the utility made subsequent to the removal of its facilities would be with 'previous authority of law.' "

C. CHAPTER 254, SESSION LAWS OF MONTANA, 1957, DOES NOT RELEASE OR REMIT A LIABILITY OR OBLIGATION IN CONTRAVENTION OF ARTICLE V, SECTION 39 OF THE CONSTITUTION OF MONTANA.

Plaintiff's contention herein is as stated in his brief as follows: "This is a case where the constitution protects the taxpayers from assuming the obligation of paying for utility removal costs when these costs had been, at Common Law, admittedly a liability or an obligation of the utility companies. Also, they are liabilities or obligations assumed by contract."

This opinion has already disposed of this first contention heretofore, when the Court ruled that although at common law the utilities were required to pay reloca-

tion costs, the legislature did have the authority to amend this common law, and, in fact, did so amend it by the adoption of Chapter 254.

Also this opinion has heretofore held that even though the liabilities or obligations for relocation were assumed by the utilities under their permit from the Highway Commission, the Legislature was within its constitutional authority to amend this agreement to provide for these payments of relocation costs.

Therefore, this Court holds that Article V, Section 39 of the Montana Constitution has no application to Chapter 254, and that the passage of said law was not in violation of said constitutional provision.

VI.

FUNDS RECEIVED BY THE STATE OF MONTANA UNDER THE PROVISIONS OF SECTION 191, TITLE 30, UNITED STATES CODE ANNOTATED MAY BE EXPENDED FOR THE PURPOSES MENTIONED IN CHAPTER 254.

This point involves only the question of whether the relocation expenses involved herein are part of the "costs of construction and maintenance of public roads" which question was presented and decided heretofore in this opinion.

IT IS THEREFORE THE CONCLUSION OF THIS COURT that the Demurrer of the Intervenors herein is hereby sustained to each of the four causes of action contained in Plaintiff's Second Amended Complaint, and,

it is further ordered that said cause of action is dismissed.

Dated this 18th day of March, A.D., 1959, in Court Chambers at Anaconda, Deer Lodge County, Montana.

SID G. STEWART
Judge Presiding.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 862.

MEMPHIS TRANSIT COMPANY,
Petitioner,

vs.

STATE OF TENNESSEE, on Relation of W. M. LEECH,
Commissioner of Highways and Public Works,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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MEMPHIS TRANSIT COMPANY,
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STATE OF TENNESSEE, on Relation of W. M. LEECH,
Commissioner of Highways and Public Works,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OPINION BELOW.

This cause was commenced in the Chancery Court of Davidson County, Tennessee, between the State of Tennessee, on relation of W. M. Leech, the Commissioner of Highways and Public Works of Tennessee (hereafter referred to as the "Commissioner"), against Southern Bell Telephone and Telegraph Company (hereafter referred

to as "Southern Bell"). The Petitioner, Memphis Transit Company, is one of more than fifty intervenors who were authorized by the Chancellor to intervene in the cause for the purpose of testifying the constitutionality of Chapter 170 of the Public Acts of 1957 (Sections 54-543-545, Tennessee Code Annotated).[1] All of the constitutional issues raised by the original bill seeking a declaratory judgment involved the Constitution of Tennessee. The basic issue was whether the State's General Assembly could constitutionally enact legislation which provided (a) for the State to reimburse utilities for the relocation of the facilities located on publicly owned rights of way when necessary due to the construction of interstate highways, and, (b) for the reimbursement of utilities for the relocation of utility facilities located on publicly owned rights of way when necessary due to the construction of any highway project built with federal aid funds, provided that the utility showed (1) hardship to the extent that its financial structure became impaired, or (2) its rates were increased as a result of bearing the costs of relocation, and (c) in the event of disagreement between the Commissioner of Highways and any utility, as to whether the utility was entitled to reimbursement under Sections 1 and 2, arbitration was provided for certain controversies. In attacking the constitutionality of this legislation, the Commissioner sought a declaration of his rights, duties and interests therein. The bill alleged that the legislation was unconstitutional violating Article II, Section 31, of the Constitution of Tennessee,[2] which forbids the use of the State's credit to or in aid of corporations and others; Article XI, Section 8, of the Constitution of Tennessee, which prohibits unreasonable legislative classifications, laws favoring individuals, and laws granting rights, im-

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1 Copied in Appendix A as codified.

2 Copied in Appendix B. Since the Court did not find it necessary to construe the other State constitutional provisions, they are not copied.

munities, privileges, or exemptions; Article I, Section 17, of the Constitution of Tennessee, which prohibits suits against the State, and Article I, Section 20, of the Constitution of Tennessee, which prevents the impairment of contracts. The bill, as amended, also alleged that the act was void for indefiniteness.

The original defendant, Southern Bell, answered the bill and the Chancellor permitted numerous private corporations, individuals, municipalities and cooperatives to intervene. They filed demurrers and Southern Bell applied for and was granted leave to withdraw its answer and file a demurrer. The intervenors were permitted to intervene for the sole purpose of participating as to the constitutional issues. Generally, the demurrers denied that Chapter 170 of the Public Acts of 1957 was invalid or unconstitutional for the reasons alleged in the bill. In addition, some of the demurrers challenged the right of the Commissioner to maintain the suit.

Alleging a justiciable controversy between the State and Southern Bell, the bill averred that there were two interstate highway projects located in Giles County, Tennessee, involving the reconstruction of a former state highway upon the right of way of which Southern Bell had installed its facilities, including poles, wires, anchors and conduits under Sections 65-2105-6, Tennessee Code Annotated. This was the only controversy alleged in the bill.

The learned Chancellor held that the Commissioner was authorized to institute and maintain the suit, but otherwise sustained the demurrers, declaring Chapter 170 of the Public Acts of 1957 valid and constitutional. The State appealed from the decree of the Chancellor to the Supreme Court of Tennessee. The opinion of the State Supreme Court is reported at 319 S. W. 2d 90. A majority of the Court held that Chapter 170 of the Public Acts of 1957 violated Article II, Section 31, of the Constitution of Ten-

nessee, and reversed the decree of the Chancellor, except as to the authority of the Commissioner to maintain the suit. The majority held that utilities which install facilities on State highway rights of way by the authority of the State statute obtain no property rights and the use of the rights of way are purely permissive. In finding that the legislation offended the State Constitution, the Court declared:

> "We think that the basic test under this Section of our Constitution is whether the expenditure is for a State purpose. In the present case the primary purpose served by the expenditure is for the convenience and benefit of the utility, the purpose cannot be public."

The dissenting opinion held that the expenditures authorized by Chapter 170 of the Public Acts of 1957 were for a public purpose and, therefore, did not violate Article II, Section 31, of the Constitution of Tennessee.

The appellees, Southern Bell, and the Intervenors, filed timely petitions for re-hearing and a re-hearing was granted. Since the Chief Justice did not participate in the first hearing, the cause was set for re-argument and the majority adhered to the original decision, overruling the petitions to re-hear. A concurring opinion was filed by two of the majority and separate dissents were filed by two members of the Court. Thereafter, the Court permitted the Petitioner, Memphis Transit Company, to file a second petition to re-hear. The second petition to re-hear alleged that its properties would be confiscated under the majority decision. In overruling the second petition, the majority of the Court held that the rights of the utilities in publicly owned rights of way were purely permissive and, therefore, there could be no issue as to confiscation under the 5th and 14th amendments to the Constitution of the United States.

JURISDICTION.

The Petitioner alleges that jurisdiction is vested in this Court by virtue of 28 U. S. C. A. 1257 (3). The Petitioner has quoted Subsection 3: "(3) By writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, **or where any title, right, privileges, or immunity is specially set up or claimed, under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States**" (Emphasis as supplied by the Petitioner).

There could not be any issue as to the repugnancy of the State statute to the Federal Constitution, and consequently, the Petitioner appears to claim some title, right, privilege or immunity under the Constitution of the United States. In other words, as the contention is understood by the respondent, the Petitioner contends that it has a "title, right, privilege or immunity" in Chapter 170 of the Public Acts of 1957, as enacted by the General Assembly of Tennessee, and the Federal Constitution guarantees to the Petitioner the benefit of the statute, although the Supreme Court of Tennessee has held that the statute violates the State Constitution. This is indeed a novel doctrine and the State respectfully insists that 28 U. S. C. A. 1257 (3) does not give this Court jurisdiction of such questions.

To the contrary, the state contends that subsection 3 was never intended to clothe this Court with jurisdiction of a question of this character. The decisions of this Court are adverse to the position of the Petitioner. In **Leeper v. State of Texas (Tex. 1891), 139 U. S. 462, 11 S. Ct. 577, 35 L. Ed. 225**, the purpose and effect of the statute was discussed and the Court opined:

> "That whether the statutes of a legislature of a state have been duly enacted in accordance with the requirements of the constitution of such state is not a federal question, and the decision of state courts as to what are laws of the state is binding upon the courts of the United States." (Citing cases.)

The rule has long been recognized that the State Courts have the absolute power and authority to adjudicate the common law of the State and to construe statutes of the State and the State Constitution. However, we quote the unequivocating language used by Mr. Justice Cardozo, who, in **Highland Farms Dairy, Inc., v. Agnew (Va. 1937), 300 U. S. 608, 57 S. Ct. 549,** wrote for the Court,

> "A judgment by the highest Court of a state as to the meaning and effect of its own Constitution is decisive and controlling everywhere."

The Petitioner has failed to point out why this Court should assume jurisdiction under 28 U. S. C. A. 1257 (3), and has failed to show to the Court, as he must do under the statute, the specific " . . . title, right, privilege or immunity . . . " which is claimed under the Fifth and Fourteenth Amendments of the Constitution of the United States. Jurisdiction cannot be assumed on the basis of vague and indefinite allegations.

The statute confers jurisdiction where a statute is challenged as being invalid because it is repugnant to the Constitution, treaties or laws of the United States. In declaring the legislative policy as to the appellate jurisdiction of this Court, Congress carefully avoided giving jurisdiction to this Court where the State statutes are declared unconstitutional under a State Constitution. The congressional policy is important because in failing to confer jurisdiction in this class of cases, Congress intended that these questions should be resolved locally in the State Courts.

Therefore the State contends that the Petitioner has not only failed to allege a substantial federal question, but has not even raised a federal question.

The State also insists that the opinion of the Supreme Court of Tennessee rests upon an adequate and independent non-federal ground and this Court is without jurisdiction. **Black v. Cutter Laboratories (Cal. 1956), 351 U. S. 292, 76 S. Ct. 824; Herb v. Pitcairn (Ill. 1945), 324 U. S. 117, 65 S. Ct. 459, 89 L. Ed. 789; Enterprise Irrigating District v. Farmers Mutual Canal Company (Neb. 1917), 243 U. S. 157, 38 S. Ct. 318, 61 L. Ed. 644.**

Further, it is immaterial whether the decision of the State Court is right or wrong since there is no assertion that the State Court adopted its view of the non-federal question in order to evade a federal constitutional issue, and the State's decision has no relation to any federal question raised in the State Courts. **Enterprise Irrigating District v. Farmers Mutual Canal Company,** supra. There it is said that this Court is without power to disturb such a judgment.

Neither can the decision of the State Court be reviewed unless the non-federal ground is unfounded.

In **McCoy v. Shaw (Okla. 1928), 277 U. S. 302, 48 S. Ct. 519, 72 L. Ed. 891,** this Court declared,

> "It is settled law that a judgment of a State Court which is put upon a non-federal ground, independent of the federal question involved, and broad enough to sustain a judgment, **cannot be reviewed by this Court,** unless the non-federal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question." (Emphasis supplied.)

Although we think that the foregoing is sufficient to warrant the dismissal of the petition for certiorari, we invoke another rule of law to sustain the position of the respondent.

In the early case of **F. G. Oxley v. Butler County (Mo. 1897), 166 U. S. 58, 65, 17 S. Ct. 709, 41 L. Ed. 1149**, this Court in discussing whether a right claimed under a treaty could be asserted when the question was presented to the State Supreme Court on a petition to re-hear, which was overruled, observed that the jurisdictional averments respecting substantial federal rights cannot be the subject of inference.

When the case at bar is tested by the foregoing authorities, it is obvious that the Petitioner has failed to show that this Court has jurisdiction. It is elementary that the General Assembly of a State cannot enact legislation which is contrary to the State Constitution. It is equally elementary that the State Supreme Court is the final arbiter as to all questions involving the construction of the State Constitution, and the determination of the extent of the State legislative power under it. Significantly, the Petitioner has failed to point to any provision of the Federal Constitution which requires that the State enact a statute for the benefit and enrichment of the Petitioner. It has not only failed to do so, but could not.

The failure to allege a substantial federal question and to show jurisdiction in this Court as required by the law and the rules of this Court is fatal and the petition for the writ of certiorari should be dismissed.

QUESTIONS PRESENTED.

1. Can this Court require a State Court to construe a State statute as being constitutional and a valid State law when the State's highest judicial tribunal finds and de-

clares that the statute is contrary and repugnant to the State Constitution?

2. If this Court should answer the first question in the affirmative, will this Court reverse the State Supreme Court and require the State Courts to determine as a matter of fact as to whether the Petitioner's properties will be confiscated under the Fifth and Fourteenth Amendments where a justiciable controversy was not alleged in an action for a declaratory judgment in a State Court as between the Petitioner and the Respondent?

3. Does the Constitution of the United States guarantee the enactment of a State statute for the reimbursement of utilities which have installed their facilities upon publicly owned rights of way by permission of another State statute?

STATUTES INVOLVED.

The statutes involved are Sections 54-543-545, Tennessee Code Annotated (also designated as Chapter 170, Public Acts, 1957), and are copied in Appendi A.

STATEMENT OF THE CASE.

As indicated by the State Supreme Court, the facts alleged in the bill must be taken as true since they are before the Court on demurrer. The facts will be briefly summarized.

The relator is the chief administrative officer of the Department of Highways and Public Works. The Department plans, locates, acquires, constructs, and maintains a system of highways for the use and benefit of the citizens and taxpayers of the State, as well as the travelling public generally. Local, state, and federal funds, varying in amounts and proportions but all derived from taxation, are jointly used for State highway purposes. The Commis-

sioner is charged by law with the expenditure of these funds. Acting on behalf of the State, he let contracts for two interstate highway projects in Giles County. The rights of way of existing highways, on which Southern Bell operated and maintained a telephone line, including wires, poles and other fixtures, were involved in the projects. The rights of way where those facilities were located belonged to the State of Tennessee and it was necessary to remove the facilities so that the highway could be reconstructed. The Commissioner was advised by the officials of Southern Bell that the utility would not re-locate its facilities at its own expense so that the highway could be improved and reconstructed, unless the State agreed to reimburse the telephone company for the costs of such relocation.

Southern Bell is a New York Corporation operating a vast communication system for profit in Tennessee and a part of its facilities, including poles, wires, underground conduits and other equipment, are installed in, upon and over publicly owned rights of way, under Section 65-2105, Tennessee Code Annotated. The public rights of way have been acquired at the expense of the citizens and taxpayers of the State, and Southern Bell, as well as other privately and publicly owned utilities, have used and occupied such publicly owned rights of way without cost or expense to them.

On the 17th day of February, 1941, Southern Bell, for a valuable consideration, entered into a valid contract with the State Department of Highways agreeing to install, construct and maintain its facilities on publicly owned rights of way as directed by the department, and to re-locate its facilities at its own expense when necessary for the improvement and construction of highways. The company refused to honor its contract, although it had obligated itself to remove and re-locate its facilities from publicly owned rights of way at its own expense.

The State, in cooperation with the Federal Government, has undertaken what is known as the interstate highway program. In acquiring rights of way for interstate highways, the State must bear ten per cent and the Federal Government ninety per cent of the costs of acquisition, provided that such rights of way have been acquired in accordance with the terms and conditions of the Federal Highway Act (23 U. S. C. A. 101, et seq.). Under Section 3, Chapter 462, Public Law 627, 84th Congress, (now 23 U. S. C. A. 123), it is expressly provided that the Government cannot participate with its funds in paying utilities to re-locate their facilities installed on existing rights of way of state highways, incorporated into the interstate system, if such payment violates State law or a legal contract between the utilities and the State.

The demurrers also admit that the Eightieth General Assembly appropriated Five Million Dollars from the surplus accrued prior to January 1, 1957, in the State's General Fund to be expended immediately for matching federal funds, and, in addition, authorized the expenditure for highway purposes during the next biennium of ". . . such receipts of highway revenues as are now provided by law . . ." by virtue of Section 16, Chapter 105, Public Acts of 1957, and that certain bonds for highway purposes be issued during the 1957-1959 biennium.

In order to participate in the interstate highway program, it was necessary for the State to appropriate and raise large sums of money necessitating the enactment of Chapter 264, Public Acts of 1957, authorizing the State Funding Board to issue bonds in an amount not exceeding Thirty Million Dollars. The reasons for authorizing the bond issue were set out in the preamble of Chapter 264, Public Acts of 1957.

In this connection, it was averred that a part of the monies raised by the bond issue would be expended upon

the acquisition of rights of way, including the costs of re-locating utility facilities as provided by Chapter 170, Public Acts of 1957, in the pathway of the construction of interstate highways and other highways as contemplated by the Federal Highway Act.

The Department has estimated that the costs of relocating utility facilities in connection with interstate highway projects in Tennessee will amount to $15,370,000.00, being more than one-half of the amount which the General Assembly authorized the State to borrow for highway purposes under Chapter 264, Public Acts of 1957.

Further, the bill charged that the only authority for reimbursing utilities for the relocation of their facilities located on a highway right of way was Chapter 170, Public Acts of 1957, and prior to its enactment there was no obligation upon the State to expend its funds for this purpose.

The bill also asserted that the rights of utilities to install, construct and maintain their facilities on publicly owned rights of way is subordinate to the superior rights of the travelling public and the utilities must adjust and relocate their facilities at their own expense when they are located on publicly owned rights of way, if such facilities obstruct the construction, reconstruction or improvement of public highways.

The bill further charged, and was admitted by demurrer, that since the organization of the highway department the State has not expended its funds to pay for utility relocations when adjustments are required on account of State highway improvement projects and Southern Bell and other utilities have not demanded payments for more than sixty years until recently. The conduct of the State and the various utilities amounted to a contemporaneous and practical construction of the rights created under the statute and due to the long acquiescence of the State's

officials and the respective utilities, as well as the general public, and such conduct prevented the utilities from making a claim that a reimbursable right was created by the statute permitting them to go upon publicly owned rights of way. Due to the conduct of the parties over a long period of time and the contract entered into by Southern Bell, the company should be estopped to assert a reimbursable interest at this late date. Further, the Attorney General construed the rights granted under the Code Section as being permissive in nature and not creating a reimbursable right and interest as long ago as 1929.

The bill further averred that the Commissioner of Highways desired to perform the duties imposed upon him by the General Assembly, unless he was inhibited therefrom by the State Constitution, and that he was advised and believed, as did the State Attorney General, that Chapter 170, Public Acts of 1957, was unconstitutional and void, and, consequently, submitted his rights and interests to the Court seeking a declaration of the law. The bill as amended, challenged the constitutionality of Chapter 170 on the grounds that it violated Article II, Section 31; Article XI, Section 8; Article I, Section 20, and Article I, Section 17, of the Constitution of Tennessee. The bill also challenged Chapter 170 on the ground of indefiniteness.

ARGUMENT.

The Petitioner cites the cases of Nashville C. & St. L. Railway v. Walters (Tenn. 1935), 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949, and Zucht v. King (1922 Tex.), 260 U. S. 174, 177, 43 S. Ct. 24, 67 L. Ed. 194, as authority for this Court to entertain the petition and grant the writ of certiorari. We do not understand that either of these cases so holds.

The Nashville case is authority for the proposition that a State cannot arbitrarily require a railroad to bear fifty per cent of the cost of eliminating a grade crossing under a State Statute. In that case the State Supreme Court held that the statute was a valid exercise of the State's police power and hence constitutional. This Court reversed the State Court on the ground that the railroad's bill for a declaratory judgment showed that the action of the State was arbitrary.

By way of contrast, the State Supreme Court, in the instant case, has held that a State statute violates the State Constitution. There was no issue of fact alleged in the Trial Court between the State and the Petitioner showing unreasonable or arbitrary action. This must be true because the factual situation alleged concerned a controversy between the State and Southern Bell not the Memphis Transit Company. The facts contained in the State's bill for a declaratory judgment were not only the sole facts before the State Court as issues in this litigation, but since the intervenors elected to demur to the bill, the facts recited in the bill must be taken as true as pointed out by the majority opinion of the State Supreme Court. Therefore, the State insists that there is a marked distinction between this case and the Nashville case. Cf. Atchison T. & S. F. Railway Company v. Public Utilities Commission (1953 Cal.), 346 U. S. 346, 74 S. Ct. 92. In Atchison, the Court distinguished the Nashville case and held that the action of the California Public Utilities

Commission was neither arbitrary nor unreasonable under a California statute requiring a railroad company to bear certain costs of certain grade separation projects.

In Zucht, the Court dealt with the validity of a compulsory vaccination ordinance requiring children of school ages to be vaccinated. This Court dismissed the writ of error although it was asserted that there was an unconstitutional exercise of authority under a valid ordinance. It is difficult to understand how the Zucht case has any application whatever to the case at bar.

The Petitioner cites authorities in support of its contention that the majority opinion of the Tennessee Supreme Court is incorrect. This Court has repeatedly stated that it is not concerned with the correctness or incorrectness of decisions of State Courts based upon State law. In view of this Court's prior cases certiorari will not be granted merely because this Court may disagree with the result reached by the State Court or would have reached a different result.

In any event, before there could be confiscation there must be a taking of a property right. The universal rule is that a statute authorizing utilities to install their facilities in highway rights of way create no property rights and the rights of the utilities are subordinate to the superior rights of the travelling public. In discussing this proposition in State of Tennessee v. United States et al. (6 Cir. 1958), 256 F. 2d 244, 258, the opinion states,

> "The telephone line here in question was originally located by permission granted by State statute, and the law is well settled that a statutory, permissive right of use of highways by public utilities is subordinate to the rights of the public; that the original location of poles or other facilities in a public highway does not create an irrevocable right to have such poles and facilities remain forever in the same place; and that a utility company may be required to relocate

its lines at its own expense when such relocation is demanded by public necessity and for public safety and welfare."

In support of the rule, the Court cited and discussed numerous cases decided by this Court and the courts of last resort in other states (256 F. 2d 258-261). The authorities are in accord that there is not a taking of property under the Fifth and Fourteenth Amendments of the Federal Constitution when utilities are required to adjust their facilities at their own expense when necessitated by highway improvement programs. Hence, the Supreme Court of Tennessee correctly concluded that no problem of confiscation is presented.

The Petitioner, by way of argument, complains that an impossible financial burden will be imposed upon it if the State and Federal Governments do not pay the bill. In speculating as to dire consequences, the Petitioner foresees possible bankruptcy. As previously pointed out, these propositions are not based upon factual allegations which were issues in this lawsuit and pleaded in the Trial Court where the Petitioner chose to controvert the facts in the State's bill by demurrer. A complete answer to a similar insistence was given in Erie Railway Company v. Board of Public Utility Commissioners (N. J. 1921), 254 U. S. 394, 410-411, 41 S. Ct. 169, where the Court stated:

"It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. . . . If the burdens imposed are so great that the road cannot be run at

> a profit it can stop, whatever the misfortunes the stopping may produce. . . . Intelligent self-interest should lead to a careful consideration of what the road is able to do without ruin, but this is not a constitutional duty."

In keeping with the foregoing statements, the State would point out that the congress in authorizing the interstate highway program foresaw that it would be many years in completion. It is reasonable to assume that the State's officials will act providently in programing the construction of interstate highways in Memphis in such a way as to minimize the financial difficulty, if any, of the Petitioner. Although these are practical considerations, they are not controlling as to the legal or constitutional rights of the Petitioner.

In the summary of the petition, the importance of this litigation is stressed, declaring that this case ". . . is one of the most important legal cases of this decade . . ." However, the claims asserted do not affect state and federal relationships, and are not shown to be of such public importance as to affect generally the citizens of the United States. Instead, according to the Petitioner, only the citizens of Tennessee and New Mexico have a direct interest in the decisions of the Courts of those states. Litigants generally attach importance to lawsuits involving their rights but that must not mean that their rights, on that account, must be given special or preferred treatment under the law. The taxpayers of the State and nation are entitled to at least the same consideration as other litigants, and this case is of equal importance to them. It is far more important to all of the citizens of Tennessee that the State Constitution be championed and realistically construed by its Supreme Court than for the Memphis Transit Company to be unjustly enriched by grants from the public treasury in a manner contrary to the expressed intent and purpose of Article II, Section 31, of the Constitution of Tennessee.

Finally, the State would re-emphasize that it was never intended for this Court to assume jurisdiction of a case decided by a State Court and founded on State law in which the State Supreme Court declared that a State Statute violated the State Constitution. If the Congress had intended that this Court have such jurisdiction, surely it would have so stated in clear language in 28 U. S. C. A. 1257 (3). Although this section has been a part of the Federal law for many years, it has not been given the construction contended for by the Petitioner, but has been construed to the contrary. We must respectfully disagree with the Petitioner's insistence that this Court has jurisdiction.

CONCLUSION.

In conclusion, the State respectfully insists that the petition for the writ of certiorari should be dismissed for the reasons herein stated and the judgment of the Supreme Court of Tennessee should be affirmed.

Respectfully submitted,

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APPENDIX A.

Code Sections of Tennessee Code Annotated.

54-543. Whenever the construction of any project on the interstate system of highways, as defined and provided for by the Federal-Aid Highway Act of 1956, being Public Law 627, eighty-fourth congress, second session, including extensions thereof in urban areas, with state and federal funds, shall necessitate the relocation of any utility facilities, as referred to in section 111 of said Federal-Aid Highway Act of 1956 (U. S. C., title 23, sec. 162), whether heretofore or hereafter constructed, the utility owning or operating such facility shall relocate the same upon order of the commissioner of highways and public works; provided, however, that the cost of relocation shall not be deemed a right-of-way cost to be paid in whole or in part by any county or municipality, but is hereby declared to be a part of the cost of the construction of such project and the same shall be paid by the state, after the utility has furnished it with all papers, records, or supporting documents required by the federal government, out of such funds then or thereafter available for such highway construction, in accordance with the provision of section 111 of said Federal-Aid Highway Act of 1956.

Provided, however, the state may by force account or contract relocate such facilities, or, as an alternative, shall have the right to require the utility owning or operating such facility to relocate the same in which event the state shall reimburse such utility for the cost or relocation in accordance with subsection (c), section 111, of said Federal-Aid Highway Act of 1956; provided further, however, in the event the utility and the state are unable to agree as to the cost of such relocation, the question may be arbitrated as hereinafter set out (Acts 1957, ch. 170, § 1).

54-544. Whenever the construction of any project on the federal-aid primary or secondary system of highways, as defined and provided for by the Federal-Aid Highway Act, of 1956, being Public Law 627, eighty-fourth congress,

second session, including extensions thereof into urban areas, with state and federal funds, shall necessitate the relocation of any utility facility, as referred to in section 111 of said Federal-Aid Highway Act of 1956 (U. S. C., title 23, sec. 162), located upon a publicly owned right-of-way and not upon a right-of-way owned by such utility, whether heretofore or hereafter constructed, the utility owning or operating such facility shall relocate the same upon order of the commissioner of highways and public works at its own expense and the utility may after such relocation make a claim to the commissioner of highways and public works for reimbursement. The commissioner is authorized and empowered to determine whether such costs, if paid by the utility, will result in undue hardship on the utility to the extent that its financial structure shall be substantially impaired or its rates subjected to an increase as a result of said relocation cost. If he finds such an impairment in the financial structure of the utility, the state shall reimburse the utility from such state and federal aid funds in such amount as the commissioner may deem appropriate but not more than provided for by subsection (c), section 111, of said Federal-Aid Highway Act of 1956 (Acts 1957, ch. 170, § 2).

54-545. In the event any utility and the commissioner of highways and public works are unable to agree on the cost of relocating facilities as provided for in § 54-543, or in the event the commissioner of highways and public works and any utility are unable to agree upon whether or not the claim of a utility as provided by § 54-544 shall be paid, such utility and the state, through the commissioner of highways and public works, shall submit the question in controversy to arbitration under the provisions of § 23-502 et seq., and the award of the arbitrators shall be final and binding upon the parties. This section shall not apply to relocation made by force account or under a contract by the department of highways and public works (Acts 1957, ch. 170, § 3).

APPENDIX B.

Constitution of Tennessee, Article II,

Sec. 31. The credit of this State shall not be hereafter loaned or given to or in aid of any person, association, company, corporation or municipality: nor shall the State become the owner in whole or in part of any bank or stockholder with others in any association, company, corporation or municipality.

FILE COPY

MAY 28 1959

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

MEMPHIS TRANSIT COMPANY,
Petitioner,

vs.

STATE OF TENNESSEE, ex rel
W. M. LEECH, Commissioner of Highways and Public Works,
Respondent.

No. 862

(Tennessee Supreme Court Record captioned State of Tennessee, ex rel vs. Southern Bell Telephone and Telegraph Company, et al with Memphis Transit Company an Intervenor.)

REPLY BRIEF TO BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

While the Petitioner believes that sufficient basis for the granting of the Writ of Certiorari is set out in its Petition, we feel it would be helpful to the Court if we filed a Reply to the Brief in Opposition to the Petition for Certiorari filed by the State of Tennessee through Messrs. James M. Glasgow and Jack Wilson, Assistant

Attorneys General. Accordingly we shall take up the points in the order in which they appear in the Brief in Opposition to the Petition for Certiorari.

At the bottom of page 2 and the top of page 3 the State again raises the principal allegations in the original bill which were issues in the State Court. The basis for the State Supreme Court decision that Chapter 170 of the Tennessee Public Acts of 1957 violates the Tennessee Constitutional provision prohibiting the lending of the State's credit is fully dealt with in this petitioner's Petition for Writ of Certiorari, wherein it was shown that the state courts of 7 of the 9 states which have passed on reimbursement acts similar to Chapter 170 of the Public Acts of 1957, and all of which have State Constitutional provisions prohibiting the lending of State's credit, have upheld these reimbursement statutes, all of which are based upon the 1956 Federal Highway Act. This was the only question decided by the Tennessee Supreme Court from the issues alleged in the State's original bill and that decision by a 3 to 2 split decision with the Chief Justice dissenting. The second point raised by the respondent is that the reimbursement act violates Article XI, Section 8 of the Constitution of Tennessee, which prohibits unreasonable legislative classifications, laws favoring individuals and laws granting rights, immunities, privileges, or exemptions.

It is well established that there is a presumption that a classification made by the legislature is reasonable, and "if any possible reason can be conceived to justify the classification • • • it will be upheld and deemed reasonable," and one who assails the classification must carry the burden of showing it is essentially arbitrary.

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143 Tenn. 86
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145 S. W. 177

Ogilvie vs. Hailey
141 Tenn. 392
210 S. W. 645

It is also well settled that "the equal protection clause does not require that the State laws shall cover the entire field of proper legislation in a single enactment."

Middleton vs. Texas Power & Light
249 U. S. 152, 157

Williamson vs. Lee Optical Co.
348 U. S. 483, 489

A somewhat similar classification is found in

Sun Coal Company vs. State
157 Tenn. 522
11 S. W. 2d 893,

which involved a statute enacted under the police power requiring operators of coal mines employing *more than 50 persons* to provide showers, etc. The statute was attacked on the ground that it was an invalid classification in violation of Arti[illegible] Section 8 of the Tennessee

Constitution. This case affirms the doctrine that if any state of facts can be reasonably conceived which would sustain the act, the act must be upheld and said "• • • even though the health of the employees in a smaller mine should be accorded the same protection, the expense of compliance with the statute may have been regarded by the legislature as too great a burden to be required of the smaller mine; and *this consideration would furnish a reasonable basis for classification.* • • •" (emphasis supplied.) By analogy the classifications in Chapter 170 of the Tennessee Public Acts of 1957 dealt with utilities where there would be a result of undue hardship on the utility to the extent that its financial structure would be impaired, or its rates subjected to an increase as a result of said relocation costs.

The third question raised at the top of page 3 was that the act in question violated Article 1, Section 17 of the Tennessee Constitution which prohibits suits against the state. The state has never seriously made this contention, and this constitutional prohibition does not apply where the state consents to such suit by legislative enactment. For example there is a statutory Board of Claims established by statute in Tennessee which hears tort and other claims against the state which Board is so well recognized by the Attorney General's office that they have a special assistant assigned to do nothing but handle board of claims cases.

In fact, the last sentence of Article I, Section 17, of the Tennessee Constitution states:

> "Suits may be brought against the State in such manner and in such courts as the Legislature may by law direct."

The fourth contention is that the statute in question violates Article 1, Section 20 of the Constitution of Tennessee, which prevents the impairment of contracts. There was a contract alleged between the State and Southern Bell Telephone & Telegraph Company in this case, the validity of which it is unnecessary to discuss here, as there has never been any contention that there was any contract requiring the Memphis Transit Company to remove its facilities at its own expense. On the contrary, the Intervening Petition of this Petitioner in the Court of original jurisdiction shows that it paid substantial considerations for its franchise and property rights therein.

The last point raised by the State was that the Act (Chapter 170 of the Public Acts of 1957) is void for indefiniteness. Our original petition points out that there are nine states in which the State Courts have passed upon acts almost identical to Chapter 170 of the Public Acts of 1957, which states have almost identical State Constitutional provisions prohibiting the lending of credit, and all of which reimbursement acts are based upon the 1956 Federal Highway Act as amended. The fact that seven of these nine states have upheld these acts should be authority enough to refute this proposition without going further into the authorities dealing with statutory construction.

While the State apparently does not seriously contend these propositions and has cited no authority on the last four propositions, we thought they should be dealt with briefly.

At page 4 of the opposition brief they quote from the

majority opinion of the Tennessee Supreme Court to the effect that the primary purpose served by the expenditure is for the convenience and benefit of the utility and the purpose cannot be public. Chief Justice Neal and Justice Tomlinson, two of the five justices of the Tennessee Supreme Court, held to the contrary, as well as seven of the nine State Courts that have passed upon this question. A splendid discussion refuting this argument, supported by Tennessee authorities, is found in that portion of Chief Justice Neal's opinion appearing at pages 54 through 58 of our petition.

At page 5 of the opposition brief it is argued that there could not be any issue as to the repugnancy of the state statute to the Federal Constitution. This argument completely misses the point. The point is that the *effect* of the State Supreme Court's holding, that the state statute violates the state constitutional provision prohibiting the lending of credit, is repugnant to the Federal Constitution and in violation of the fifth and fourteenth amendments to the United States Constitution.

The State further argues that we have no "rights" and that we are mere permissive users on the state's rights of way. This is clearly an erroneous argument. To begin with, our intervening petition sets forth very valuable considerations paid by this petitioner to the City of Memphis under authority of the appropriate Tennessee Statutes for its franchise rights in the City of Memphis. Even without these payments the fact that a utility's right of occupancy is a vested right under the Federal Constitution was decided in Russell vs. Sebastian, 233 U. S. 195, 58 Law Edition 912 (and many other

cases therein cited.) In Russell vs. Sebastian this Court said:

> "That the grant, resulting from an acceptance of the state's offer, constitutes a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this Court."

This is a well established principle in this Court as well as in Tennessee. The principle was established in Tennessee in

> *City of Chattanooga vs. Tennessee Electric Power Co.*
> 172 Tenn. 524,
> 112 S. W. 2d 385,

in which the Court said:

> ". . . a right-of-way upon a public street, whether granted by act of the legislature or ordinance of city council or in any other valid mode, is an easement, and as such is a property right, capable of assignment, sale and mortgage, and entitled to all of the constitutional protection afforded other property rights and contracts . . ."

This case further recognizes that the rule is adhered to by the United States Supreme Court.

The opposition brief cites a number of cases which they state hold that the judgment of the highest court of the state as to the meaning and effect of its own constitution and statutes is controlling. It is conceded that this is the general rule, but *it does not apply in cases of arbi-*

trary exercise of the police power where the effect of the decision contravenes the United States Constitution.

The case of

McCoy vs. Shaw
277 U.S. 302,
48 S. Ct. 519,
72 L. Ed. 891,

cited on page 7 of the opposition brief, recognizes exceptions where the decision is arbitrary or is a device to prevent a review upon the Federal question.

In the case of

N. C. & St. L. Railway vs. Walters
294 U.S. 405,
79 L. Ed. 949,

this Court said, at page 955 of 79 Law Edition, in part:

> "The police power is subject to the constitutional limitation that it may not be exerted arbitrarily and unreasonably."

In that case the state was attempting to impose upon the railroad one-half of the cost of the underpass in question in 1935. As in the present case, the railroad in the *Walters* case got no benefit from the underpass except that which was common to the entire United States taxpaying public. The Court talked about the impact of the great Federal highway program of that day, which was a mere drop in a bucket compared to the impact of the unprecedented highway program contemplated by the Federal Highway Act of 1956 as amended. The Court

held that imposition of 50% of these costs on the railroad would be an arbitrary and unreasonable exercise of the police power.

In the present case, the State is attempting to impose upon this petitioner 100% of these costs, and if imposition of 50% of the costs in the *Walters* case justified a holding that it was an arbitrary exercise of the police power, certainly our contention that the effect of the decision of the majority of the Tennessee Supreme Court (split decision 3-2) is an arbitrary exercise of the police power upon this petitioner, is warranted.

In the *Walters* case, as in the present case, the utility was contending that the effect of the holding was in violation of the Fourteenth Amendment to the United States Constitution.

The majority opinion of the Tennessee Court on rehearing ignored the Federal constitutional question set forth in this Petitioner's Intervening Petition in the Court of original jurisdiction and two Petitions to Rehear and thereby evaded it.

The opposition raises the question:

> "Can this court require a State Court to construe a state statute as being constitutional and a valid state law when the state's highest judicial tribunal finds and declares that the state statute is contrary and repugnant to the State Constitution?"

It is our earnest insistence that under the *Walters* case, cited in our Petition for Writ of Certiorari, and cases cited therein, the highest court of the state has no right

to hold a state statute unconstitutional under the state Constitution if the *effect* of that holding amounts to an arbitrary exercise of the police power in violation of the Federal Constitution. The opposition brief raises the question that if this first question can be determined in the affirmative, could this Court determine as a matter of fact that the petitioner's properties will be confiscated under the Fifth and Fourteenth Amendments when a justiciable controversy was not alleged in an action for declaratory judgment in a state court as between the petitioner and respondent? Petitioner in its Petition for Certiorari sets out the allegations in the Intervening Petition in the court of original jurisdiction and the substance of the two Petitions to Rehear setting forth the fact that the capital structure of this petitioner will not permit payment of these relocation costs, the fact that the probable result will inevitably be bankruptcy or receivership, and that the effect will be a taking of this petitioner's property without due process of law. These wholesale takings of this petitioner's property are brought about by the tremendous costs involved by a vast new concept of multilane high-speed trafficways, which require rights-of-way of spectacular width, cloverleafs, overpasses, underpasses and long distances thereof through urban areas, contributing to the tremendous cost of the National System of Interstate and Defense highways. The real causative factor is the 1956 Federal Highway Act as amended. This Act is no ethereal dream, it is an actual reality and an Act before this Court.

The opposition brief subsequently argues that before there could be confiscation, there must be an actual taking of the property right. Learned counsel in opposition have apparently forgotten that it was they who

filed the "Original Bill for a Declaratory Judgment" in the Chancery Court of Davidson County, Tennessee, the court of original equity jurisdiction in our state. The suit was filed in the name of the Highway Commissioner by them on relation of the State of Tennessee *to seek a declaration of the rights of the parties.* It was they, who in the prayer to their original bill among other things prayed:

> "2. That Chapter 170 of the Public Acts of 1957 be declared unconstitutional and for nothing held and that the Court declare and fix the rights of the parties under the Constitution, the statutes . . . and
>
> 3. That the complainant have general relief."

Like the *Walters* case, this suit was begun in the same Tennessee equity court of original jurisdiction for a declaratory judgment. Although the suit was originally instituted against Southern Bell Telephone and Telegraph Company, by order of the Chancery Court this Petitioner was allowed to intervene and file an Intervening Petition. There is no reason for this petitioner to sit and wait until it is doomed by the actual taking of the property and if such were done, no doubt learned opposition counsel would raise the point that we should have raised the point we are raising in this litigation. On this proposition, we cite 19 *American Jurisprudence,* under the subject of *Equity,* Section 127, which is in part as follows:

> "127. *Retention of Jurisdiction; Disposal of Litigation.*—The rule is that equity will not enter a partial or incomplete decree. Having taken cognizance of a cause for any purpose, a court of equity will ordinarily retain jurisdiction for all purposes; de-

cide all issues which are involved by the subject matter of the dispute between the litigants; award relief which is complete and finally disposes of the litigation so as to make performance of the court's decree perfectly safe to those who may be compelled to obey it; accomplish full justice between the parties litigant; and prevent future litigation. All persons who are interested in the subject matter of dispute will be brought before the court in order that there may be entered and enforced a complete and effective decree which will finally adjust the rights of all concerned. A part of the controversy should not be remitted to a court of law. . . .". (Emphasis supplied)

A court of equity ought to do justice completely and not by halves.

Greene vs. Louisville & I. R. Railroad Co.
244 U. S. 499,
61 Law Ed. 1280,
37 S. Ct. 673

McGowan vs. Parish
237 U. S. 285,
59 Law Ed. 955,
35 S. Ct. 543

Camp vs. Boyd
229 U. S. 530,
57 Law Ed. 1317,
33 S. Ct. 785

The record (Petitioner's Intervening Petition and two Petitions to Rehear) clearly shows that the effect of this decision will amount to a wholesale taking of this petitioner's property. The 1956 Federal Highway Act as amended is before this Court and its terrific impact is manifest and obvious from the Act itself.

On pages 10 and 11 of the opposition brief, they go into the alleged contract between the State and Southern Bell Telephone and Telegraph Company. This is an irrelevant argument for the very good reason that nowhere in the record is it contended that there was any contract in existence between this Petitioner and the State.

On page 12 of the opposition brief, it is argued that they estimate the cost of removing these utility facilities as being $15,370,000.00, being more than one-half of the amount the General Assembly of 1957 authorized the State to borrow for highway purposes under Chapter 264 of the Public Acts of 1957. The fallacy in this argument is that the appropriation under Chapter 264 of the Public Acts of 1957 was for a biennium, and the Federal Highway Program is planned to extend over a thirteen to fifteen year period. Furthermore on any Interstate Defense Highway the State will only be paying ten per cent of the cost of relocation and the Federal Government the remaining ninety per cent.

In discussing *Nashville, Chattanooga & St. Louis Railway v. Walters* on page 14 of the opposition brief it is conceded:

> "The Nashville case is authority for the proposition that a State cannot arbitrarily require a railroad to bear fifty per cent of the cost of eliminating a grade crossing under a State statute."

This concession by implication admits that the State cannot arbitrarily require this Petitioner to bear one hundred per cent of the cost of removing its facilities as a result of impact of the unprecedented Federal High-

way program. If this Honorable Court would think the action in the Walters case was arbitrary, certainly there should be no question but that the effect of the present decision is unreasonable and arbitrary action.

The General Common Law Rule requiring utilities to move their facilities for road improvement at their expense grew out of horse and buggy days, when travel was largely local and the costs were ultimately paid by local people in increased utility rates. As pointed out in our Petition for Writ of Certiorari, Congress recognized this in their Congressional hearings.

In addition to the tremendous amount of Interstate travel today, these Interstate Highways are built for National Defense as well. Congress, therefore, recognized that it was inequitable to force the tremendous relocation cost involved upon local ratepayers who receive no advantage, which is not common to the entire United States tax paying public.

The State relies heavily upon

Erie Railroad Co. v. Public Utilities Commissioners 254 U. S. 394; 41 Supreme Court 169,

and it might be noted that Counsel for the State of Tennessee relied upon this same case in the Walters case, and that this Court distinguished the Erie Railroad Company case from the Walters case, as should be done in this case. The Erie case was decided January 3, 1921, and simply reiterated the old Common Law Rule at a time long before the terrific impact of the present Federal Highway Program was felt.

The State also relies upon

Atchinson T. & S. F. Railway Co. v. Public Utilities Commission (1953 Calif.) 346 U. S. 346; 74 Supreme Court 92. This was a case which again largely involved a local transportation problem, and the case cites the *Walters* case with approval. The main cost of this petitioner, as shown by the record, comes from the clover leaves, changes in grade and other problems attached to relocations necessitated by the Interstate Defense System under the 1956 Federal Highway Act.

The State also relies upon

State of Tenn. v. United States, et al (6th Circuit 1958), 256 Fed. (2d) 244, 258. This case involved the alleged contract between the State of Tennessee and Southern Bell Telephone and Telegraph Company, and an entirely different set of facts from those presented under the reimbursement statute.

On page 17 the opposition brief states:

> "However, the claims asserted do not affect State-Federal relationships, and are not shown to be of such public importance as to affect generally the citizens of the United States."

We are at a loss to see how our opponents can claim that there is no State-Federal relationship, when the whole basis for the State Act in question was the 1956 Federal Highway Act, and its sole purpose was to enable the State to pay enough to the utilities to qualify for reimbursement under the Federal Act.

We further respectfully submit that this principle involves every utility user or rider in the United States, and that it, therefore, affects over ninety per cent of the citizens of the United States. It is hard for us to conceive of a question that would affect more pocket books.

CONCLUSION.

In conclusion this petitioner respectfully urges that the effect of the Tennessee Supreme Court's decision will amount to a wholesale taking of this petitioner's property, without due process of law in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States, and will literally bankrupt many of the small and sick utilities. The broad principles involve over ninety per cent of the citizens of the United States (all utility riders and users of any type), and the gross inequity of having citizens in some states paying for these relocation costs in utility bills, and again paying in Federal taxes for ninety per cent of the relocation costs in other states where similar acts are upheld.

It is respectfully urged that a situation where local rate payers paid for relocation cost for improvement of roads almost entirely for local benefit, which was the reason underlying the old Common Law General Rule, no longer exists, and that the tremendous new concepts of Interstate Defense Highway building under the 1956 Federal Act must be recognized, and that if so, progress demands modification of the Common Law Rule, and demands protection for the utilities against an arbitrary and unreasonable exercise of the police power. When a State Legislature attempts to modify the Common Law Rule, as the Tennessee Legislature did by unanimous vote in the passage of Chapter 170 of the Public Acts of 1957, three of the five members of the Tennessee Supreme Court should not be permitted to substitute their opinion for Legislative discretion, when the effect of this opinion so clearly contravenes guaranties under the United States Constitution. As stated in the Petition for

Writ of Certiorari, literally hundreds of millions of dollars are involved in this question, as well as equities involving over ninety per cent of our citizens. State Courts in seven out of nine States which have passed upon statutes almost identical to the Tennessee Statute in question here, with constitutional prohibitions against the lending of the State's credit almost identical to the Tennessee Constitutional Provision, have upheld these Acts. Not only does the effect of the Tennessee decision amount to a wholesale taking of this petitioner's property and the property of many other utilities without due process of law, but the principle involved denies the citizens of Tennessee, New Mexico and those of any other State which should adopt the minority view, their guaranty of equal rights so basic under the United States Constitution.

Respectfully submitted,

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